Notes

IN DEFENSE OF "AND/OR"

QUITE unexpectedly, a section of the American legal world, has initiated a violent attack on the use of the ancient and respectable expression "and/or."[1] Even though the cases before them raised no question of construction, certain judges have taken occasion to condemn the word as a "barbarism,"[2] a "Janus-faced verbal monstrosity,"[3] a "freakish symbol."[4] And when, in a letter to a journal, a famous laywer threatened to spend his declining years warring against the little "bastard," a prominent Senator cited him approvingly, and moved to strike from a proposed resolution every last "and/or."[5] Finally, in Illinois, a court held that a section of the state constitution requiring judicial proceedings to be conducted in the English language forbids it to consider submitted findings of fact and propositions of law which contain the "freakish fad."[6]

But while the aim to obliterate the device is clear enough, the reasons, if any, impelling such a novel crusade are somewhat nebulous. No doubt the sincere crusader's trouble starts with the thought that "and" conjoins, while "or" disjoins, so that the two are contradictory, and their combination logically absurd. On this theory, the author of a recent article, for example, insists that it means "nothing."[7] It is, however, difficult to pose a sentence in which "and/or" would be contradictory. No one questions a New York statute requiring licenses of people engaged in the sale of "liquor and/or wine."[8] One who sells liquor, or one who sells wine, or one who sells liquor and wine, must have a license. But the proposition, "Shakespeare was born in March and/or April," is nonsensical since March and April are in this context mutually exclusive, and cannot be conjoined.

Further investigation of "and/or" in its customary usage and in standard works on logic clearly demonstrates that it is generally neither awkward nor ambiguous.[9] "And/or" is proper, first, for denoting shades of difference in meaning of words that may or may not be identical in the reader's mind. Careful lest justice be halted by a stickler for words, a judge will instruct a jury to find that eggs were shipped "upon the request of and/or demand of the defendant."[10] In this case, the "or" indicates

1. HARPER'S MONTHLY MAGAZINE, July 1932; *An And Or Symposium*, 18 A. B. A. J. 574 (1932); *And/or*, 7 AUST. L. J. 76 (1933); Parsons, *And/or* (1935) 40 CORN. L. Q. 372; *And/or*, N. Y. L. J., Dec. 23, 1935, at 2572, cols. 1-3. But cf. N. Y. L. J., Feb. 7, 1936, at 692, col. 3.

2. Cochrane v. Florida East Coast Ry. Co., 107 Fla. 431, 145 So. 217 (1932).

3. Employers' Mut. Liability Ins. Co. of Wisconsin v. Tollefson, 263 N. W. 376 (Wis. 1935).

4. Russell v. Empire Storage Co., 332 Mo. 707, 59 S. W. (2d) 1060 (1933)

5. The lawyer, Mr. John W. Davis; the senator, Senator Carter Glass of Virginia. See N. Y. L. J., Dec. 23, 1935, at 2572, col. 1; and see N. Y. L. J., March 6, 1936, at 1168, col. 2.

6. Tarjan v. National Surety Co., 268 Ill. App. 232 (1932).

7. Parsons, *And/Or* (1935) 40 CORN. L. Q. 372.

8. N. Y. ALCOHOLIC BEVERAGE CONTROL LAW (1934). The New York Court of Appeals has borrowed the phrase in cases which have involved the act. Continental Casualty Co. v. National Slovack Sokol, Inc., 269 N. Y. 283, 289, 199 N. E. 412, 413 (1935); Seeck & Kade, Inc., v. R. Tomshinsky, 269 N. Y. Rep. 107, 109 (1936).

9. See COHEN AND NAGEL, AN INTRODUCTION TO LOGIC AND SCIENTIFIC METHOD (1934) 100 et seq.

10. See Russell v. Empire Storage Co., 332 Mo. 707, 59 S. W. (2d) 1060 (1933).

that the two expressions denote the same set of facts.[11] The "and" serves one or two purposes: first, it joins two sets of symbols whose denotations are believed to be identical but whose connotations differ; second, it informs the jury that even if "demand" and "request" were assumed to include slightly different classes of facts, it is the intention of the speaker to include both.

"And/or" may also be validly employed to conjoin completely different classes. "Or" here signifies "either" or "both," and "and" merely confirms the latter lest some ambiguity in the text, or ignorance of an elementary and customary use of the word "or" lead some to believe that only "either" and not "both" is meant. English mercantilists, to whom belongs the honor of the term's invention and popularity, frequently would rely on "and/or" for that degree of precision and brevity required in business. Instead of going to the length of saying "please ship me some rice in March or in April, or in both March and April, whichever is most convenient," the merchant stated that shipments are to be made "during the months of March and/or April;"[12] and rather than order a cargo of sugar and molasses, or of other lawful produce, or of sugar and molasses and other lawful produce, he specified that he wanted "a cargo of sugar, molasses, and/or other lawful produce."[13] In the cases actually involving these provisions no question of construction arose, and there was no judicial criticism, the opinions having been written years ago. Yet in a recent injunction suit where the union alleged that its members were "individually engaged in the business of manufacturing and/or erecting or installing architectural iron and structural steel," the court, although admitting that the specific use was not "so inappropriate," felt morally obliged to condemn the word's place in vocabulary.[14]

At least one case, however, suggests that the unwary student of "and/or" will criticize the term because of difficulties inherent in the ideas expressed rather than in the manner of expression. In a suit for conversion of books, a count alleging that the defendant converted "said books and/or records or a copy thereof" was held demurrable for uncertainty.[15] The ambiguity, however, was due to the fact that the court thought the pleading should state definitely whether books, or records, or both, were converted. "And/or" therefore conveyed its idea with perfect clarity, but that idea was not adequate for pleading the particular case.[16]

It would seem, therefore, that this "Janus-faced verbal monstrosity," much villified by eminent members of bench and bar, is a perfectly legitimate offspring of the necessity for brief and precise expression. More serious thought to this happy phrase, which has the authority of logic as well as long and honorable precedent, would have convinced the enthusiastic crusaders that they were tilting their lances at windmills.[17]

11. To the effect that "or" may mean "including" see Cardozo, J., in Utica City Nat. Bank v. Gunn, 222 N. Y. 204, 118 N. E. 607 (1918).

12. Bowes v. Shand, 46 L. J. Q. 564 (1877).

13. Cuthbert v. Cummings, 10 Exch. 809, 814, 156 Eng. Rep. 668, 670 (1855).

14. Preble v. Architectural Iron Workers' Union, 260 Ill. App. 435 (1931).

15. Clay County Abstract Co. v. McKay (Ala.) 147 So. 407 (1933).

16. For an instance of genuinely poor draftsmanship see State v. Dudley, 159 La. 872, 106 So. 364 (1925), in which, because the "or" of "and/or" did not fit the context at all, the court simply expunged it from the statute.

17. In N. Y. Agriculture and Markets Law (1934) Art. 21, "and/or" is employed seventeen times. In a single section of the N. Y. Alcoholic Beverage Control Law (1934) § 102, it is used sixteen times.

UNSATISFIED JUDGMENTS AGAINST SERVANTS AS BARS TO SUBSEQUENT ACTIONS AGAINST NON-NEGLIGENT MASTERS

THE servant of the defendant, while operating a motor truck within the scope of his employment, negligently injured the plaintiff. A judgment recovered against the servant remaining unsatisfied, suit was brought against the master on the basis of his vicarious liability. In this latter action the master defended on the theory that, being liable only under the doctrine of respondeat superior, the prior judgment against the servant on essentially the same facts constituted an election which barred the instant proceedings. The Vermont court upheld this contention[1] although the precise grounds for the decision are somewhat obscure. Seemingly the court reasoned that master and servant could be jointly liable in this case only if they were joint tortfeasors; and that, unless they were such and therefore subject to the rule, well established in the United States, that an unsatisfied judgment against one joint tortfeasor is not a bar to the subsequent prosecution of suit against any or all of the remaining joint tortfeasors,[2] the plaintiff was precluded from pursuing the present action. Thereupon the court concluded that master and servant were not joint tortfeasors both because they were not joinable in one action and because the liability imposed upon the master by the doctrine of respondeat superior is alternative rather than joint in character.

The single issue presented by the instant case and lost in a discussion of joinder, joint liability, and joint tortfeasors, was whether a prior unsatisfied judgment against the servant could, on some theory of "election," validly be pleaded in bar to a subsequent action against the master.[3] Although "election" has been a troublesome judicial concept, ill-defined and loosely used, it is not a positive rule of law, but rather, a descriptive term applied to a variety of situations in which plaintiffs are compelled for equitable and procedural reasons to exercise a choice.[4] Unless such compulsions are present in the instant case, the court's insistence upon an election would seem to be erroneous.

The precise situation presented by the principal suit is somewhat novel although

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1. Raymond v. Capobianco, 107 Vt. 295, 178 Atl. 896, 98 A. L. R. 1051 (1935), noted in (1936) 36 COL. L. REV. 324.

2. Lovejoy v. Murray, 3 Wall 1 (U. S. Sup. Ct. 1865); Huey v. Dykes, 203 Ala. 231, 82 So. 481 (1919). In England [Brinsmead v. Harrison (1872) L. R. 7 C. P. 547] the contrary rule prevails. Only satisfaction by one joint tortfeasor or its equivalent will bar a subsequent action against a joint tortfeasor not a party to the first judgment. THROCKMORTON'S COOLEY ON TORTS (1930) 180-185. Some hold that execution even without satisfaction is a bar. But see 1 FREEMAN, JUDGMENT (4th ed. 1892) § 236; Comment (1924) 24 COL. L. REV. 891.

3. The issue as stated by the court was somewhat different: "The only question presented by the demurrers is whether a master who is made liable . . . . under the doctrine of respondeat superior . . . . is a joint tortfeasor so that he may be sued jointly with the servant, or severally for the negligent or wrongful act of the servant."

4. The doctrine of election is in general disrepute because of its loose and arbitrary application. It has been assailed as obsolete and harsh by the United States Supreme Court, Friedrichsen v. Renard, 247 U. S. 207, 213 (1918), and courts have been generally criticized for their tacit acceptance of it as self-sufficing dogma without an inquiry into the basic principles which justify it. Clayton, *Election Between The Liability of an Agent and of His Undisclosed Principal* (1924) 3 TEX. L. REV. 384; Davidson, *Proposal to Abolish the Doctrine of Election of Remedies* (1934) 13 ORE. L. REV. 298; Deinard, *Election of Remedies* (1922) 6 MINN. L. REV. 341; Note (1922) 36 HARV. L. REV. 593; Comment (1924) 34 YALE L. J. 665, 667.

the legal principles involved are not unfamiliar.[5] In the analogous undisclosed principal cases of contract law, a prior judgment, even though unsatisfied, is customarily held to constitute an election binding upon the plaintiff.[6] The basis for such a holding is readily found in the fact that an agent, in the absence of express agreement to the contrary, is not bound by the contracts made on behalf of his principal; but is liable only on his own contracts made by himself as principal. Therefore, in such cases, the principal can be liable only if the agency relationship is recognized; and the agent, who represented himself to be a principal, can be held only if the agency is disregarded. Consequently, any attempt to hold liable both the agent and the principal would place the plaintiff in the inconsistent position of both affirming and denying the agency relation. Yet, even in these cases, there is considerable conflict, and it has been suggested both that the majority rule does not require election, and that the alleged inconsistency does not really exist.[7] Whatever the state of the authorities in contract may be, it is clear that the objection of inconsistency is not available in tort. The servant is liable for his own negligence at all times, irrespective of whether his agency position is recognized or not; and the master, as soon as it is established that he is such, is liable without reference to his own fault, because the law has imposed an absolute obligation upon him as a matter of social policy. Accordingly, there is no inherent contradiction in the insistence that both are under an obligation to the plaintiff. And with the inconsistency objection thus disposed of, no valid basis remains for requiring an election in the present litigation. The contentions that the defendant has been prejudiced, or that the plaintiff will be unjustly enriched find no factual support in the report of the case. Further, it seems specious either to suggest that the courts are being trifled with,[8] or to argue the doctrine of merger.[9] Likewise the doctrine of res adjudicata should have only a limited application,[10] since the second action involves additional issues and is brought against a different person, not in privity with the first defendant. Moreover, it is difficult to

5. The instant case is to be distinguished from those in which the prior judgments have been in favor of the servant or the master, in which situation there is considerable conflict over whether the subsequent action is barred. Those cases involve different legal and equitable principles. Nelson v. Illinois Central Rr. Co., 98 Miss. 295, 53 So. 619 (1910); Myers Adm'x v. Brown, 250 Ky. 64, 61 S. W. (2d) 1052 (1933); Town of Waynesboro v. Wiseman, 163 Va. 778, 177 S. E. 224 (1934); cf. Doremus v. Root, 23 Wash. 715, 63 Pac. 572 (1901); FREEMAN, JUDGMENTS (5th ed. 1925) § 469. Yet if a judgment in favor of the servant is no bar to a subsequent action against the master (*Nelson* case, *supra*) in spite of the equitable and logical barriers to such an action, there would seem to be no reason why a judgment against the servant should be a bar.

6. RESTATEMENT, AGENCY (1933) § 210.

7. Beymer v. Bonsall, 79 Pa. 298 (1875) (only satisfaction of claim will bar); Barrell v. Newby, 127 Fed. 656 (1904) (first suit against agent barred a later one against principal). See Meechem, *The Liability of an Undisclosed Principal* (1910) 23 HARV. L. REV. 590, 595; Merrill, *Election Between Agent and Undisclosed Principal* (1933) 12 NEB. L. BULL. 100, 118 et seq.

8. For an excellent disposition of this argument see Hine, *Election of Remedies, a Criticism* (1913) 26 HARV. L. REV. 707, 711.

9. See Hine, *supra* note 8 at 708-714. See also Lovejoy v. Murray, 3 Wall 1, (U. S. 1865); Comment (1929) 39 YALE L. J. 265, 266. Only Clayton, *supra* note 4, clings to this theory.

10. When employed it should be confined (a) to the existence of the negligent act or acts, and (b) to the extent of the damages recoverable. Betcher v. McChesney, 255 Pa. 394, 100 Atl. 124 (1917); Town of Waynesboro v. Wiseman, *supra* note 5.

perceive any reason why the rule permitting suit against one joint tortfeasor subsequent to an unsatisfied judgment against the other, should not also prevail in the master-servant situation.[11] And it is significant that the few courts which have had occasion to rule on the point in issue, have agreed that such a prior judgment against the servant should not frustrate the plaintiff in subsequent proceedings against the master.[12] The Vermont court, however, sustained only by dicta of other courts,[13] reached the contrary conclusion by virtue of the unusual argument that the vicarious liability of the master is only a substituted or alternative one which cannot exist concurrently with that of the servant.[14] The necessity of an election is thereby read into the doctrine of respondeat superior itself. Although the legal literature contains little of certainty about this doctrine, such an approach, apparently repudiated by most courts,[15] seems to be both tenuous and unwarranted.[16] Furthermore, it ignores

11. The obligation which the law imposes on the master is not discharged by a judgment against the servant. Neither, it is true, does satisfaction by the servant discharge the master's obligation; but in such a case, equity prevents a second recovery. In the absence of such equitable barriers, the doctrine of election should only be cautiously invoked.

12. Brennan v. Huber, 112 Pa. Sup. 299, 171 Atl. 122 (1934) (assuming that master and servant are only severally liable, and not jointly so, the unsatisfied judgment against the servant does not bar subsequent action against the vicariously liable master; Huey v. Dykes, loc. cit. *supra* note 2 (judgment against, and even tender by, master is no bar to action against servant); Maple v. Rr. Co., 40 Oh. St. 313 (1883); cf. Parmenter v. Barstow, 21 R. I. 410, 43 Atl. 1035 (1889) (although the facts are not clearly stated); Gadsden v. Crafts, 175 N. C. 358, 95 S. E. 610 (1918); Schultz v. Brunhoff Mfg. Co., 22 Oh. App. 220, 153 N. E. 924 (1926); Verhoeks v. Gillivan, 244 Mich. 367, 221 N. W. 287 (1928). The case of McNamara v. Chapman, 81 N. H. 169, 123 Atl. 229 (1923) in which a judgment recovered from the master, remaining unsatisfied, was held to bar subsequent action against the servant, is distinguishable in that there a payment of the judgment was tendered by the master. The decision was strictly limited by the final paragraph to the peculiar facts of the case, and, earlier, the court expressly reserved the question of whether the "election" would be "incomplete" if the prior judgment proved valueless.

13. Betcher v. McChesney, 255 Pa. 394, 398, 100 Atl. 124, 125 (1917); Wolf v. Kenyon, 242 App. Div. 116, 118-119, 273 N. Y. Supp. 170, 173-174 (3d Dept. 1934). *Contra:* Mayberry v. Northern Pacific Ry. Co., 100 Minn. 79, 83, 110 N. W. 356, 357 (1907); Rookard v. Atlantic & Charlotte Ry., 84 S. C. 190, 192, 65 S. E. 1047 (1909); The Jungshoved, 212 Fed. 122, 127 (S. D. N. Y. 1921), semble; Gordon v. Cross & Roberts, 287 Mass. 362, 363-4, 191 N. E. 407 (1934). Likewise, inferences and dicta that a judgment does not constitute an "election" are plentiful in the cases allowing joinder, *infra* notes 25 and 27.

14. The court observed: "The master is not a wrongdoer but the law gives to the injured party the right to elect to treat the master and servant as one and recover from the master, or to disregard their relation and recover from the servant. He can treat the servant's act as that of the master but not as that of the master and servant." To the same effect: McNamara v. Chapman, 81 N. H. 169, 173, 123 Atl. 229, 231 (1923).

15. This is evidenced by the many cases allowing joinder of master and servant, see *infra* note 27. Further, many courts which refuse joinder recognize that separate or concurrent actions may be maintained against master and servant. See Warax v. Cincinnati N. O. & T. P. Ry. Co., 72 Fed. 637, 647 (C. C. Ky. 1896); French v. Central Construction Co., 76 Oh. St. 509, 517, 81 N. E. 751, 752 (1907); Gordon v. Cross & Roberts, 287 Mass. 362, 363, 191 N. E. 407 (1934) and cases there cited. Such a holding is inconsistent with an alternative liability.

16. Unwarranted because: (a) not reconcilable with the several liability which, even

the fact that the liability of the master is really that of a surety, although a nonconsensual one,[17] and that an unsatisfied judgment against a principal is not a bar to an action against his surety,[18] with whom he is jointly liable.[19]

The single issue before the court, having thus been settled by this uniquely restrictive construction of the master's liability, an inquiry into whether the master and servant were joint tortfeasors became superfluous; yet the court devoted the greater portion of its opinion to that problem, probably because of its recognition that if master and servant were joint tortfeasors, the liberal rule on prior unsatisfied judgments would apply. Nevertheless, it is submitted, the determination that a master and servant are not joint tortfeasors was unnecessary, if not irrelevant to the decision. The joint tortfeasor relationship is only one instance in which an "election" is not required. It would have been equally as pertinent to have determined that master and servant were not partners and therefore not jointly liable. The assumption of the court that unless master and servant were joint tortfeasors they could not be jointly liable is justifiable only if "joint tortfeasors" is viewed uncritically as coextensive with all joint liability in tort. Even so, the holding that an "election" becomes mandatory in the absence of joint liability seems erroneous.[4] The existence of a several liability does not *a fortiori* make election inevitable. Furthermore, whether given persons are joint tortfeasors is only a controversy over the terminology to be employed in describing an agreed state of facts. Originally the term "joint tortfeasor" was restricted to those who concertedly engaged in tortious acts;[20] but it has been subjected to such judicial expansion,[21] that it has now become synonymous

the instant case elsewhere apparently concedes, attaches to master and servant; (b) not consistent with the many cases which have allowed joinder (*infra* note 27), which have held master and servant to be jointly liable (*infra* note 25), which have at least admitted the possibility of concurrent actions (*supra* note 15), and which under similar circumstances have held that a prior judgment is no bar (*supra* note 12); (c) it would be more reasonable to suppose that this Latin maxim, by which a new liability was judicially legislated into being, created a supplemental right which would insure to plaintiffs a reimbursement for loss, and does not necessitate the forfeiture of a right already concededly existing. To read into respondeat superior the rigors of an enforced election may well be to defeat the ideals of justice and social policy upon which the doctrine was founded.

17. Campbell, *Non-Consensual Suretyship* (1935) 45 YALE L. J. 69, 85 et seq.

18. ARANT ON SURETYSHIP (1931) pp. 376-379; ARNOLD, SURETYSHIP AND GUARANTY (1927) §§ 164, 257.

19. ARNOLD, op. cit. *supra* note 18 at §§ 4, 7, 106, 257.

20. Drown v. New England Tel. & Tel. Co., 80 Vt. 1, 10, 66 Atl. 801, 803 (1907). On the nature of a joint tort, see (1924) 34 YALE L. J. 335; (1932) 17 MINN. L. REV. 109; (1934) 38 DICK. L. REV. 200.

For those courts retaining the literal and limited definition, a vicariously liable master, although jointly liable, obviously cannot be a joint tortfeasor since he neither commits a tort nor does he act in concert. Mulchey v. Methodist Religious Society, 125 Mass. 487, 489-90 (1878); Herman Berghoff Brewing Co. v. Przbylski, 82 Ill. App. 361, 373 (1899); McNamara v. Chapman, 81 N. H. 169, 171, 123 Atl. 229, 230 (1923).

21. At common law, joinder was denied to plaintiffs unless the defendants were associated in a joint tort. CLARK, CODE PLEADING (1928) 261. As a result, in an effort to give plaintiffs the benefits of joinder, there are many labored decisions holding persons to be joint tortfeasors who really are not such. Note (1926) 41 A. L. R. 1223. "More frankly, perhaps, the term joint tortfeasor is applied wherever the court has determined that either of two defendants should be made responsible for the entire injury." Note (1927) 36 YALE L. J. 886. The original significance of the term has been lost under the weight of the many exceptions made to it.

with joint liability in tort.[22] Whether master and servant are joint tortfeasors is therefore dependent wholly upon whether the court adopts the broad or the narrow definition. It is probable, as the language of the instant opinion reveals, that the Vermont court identified the phrase with joint liability in tort. Yet joint liability is likewise impossible to define with exactitude; procedurally it is often treated as equivalent to joinder, and substantively it is frequently viewed as the legal consequence of several distinct types of situations, such as those in which a joint tort has been committed, those in which independent concurring acts combine in the production of injury, and those in which, by reason of some special relationship between the parties, such liability is necessitated as a matter of justice to insure compensation to injured persons.[23]

Finally, issue can be taken with the conclusion of the court that master and servant are not jointly liable. An adverse conclusion has repeatedly been reached by legal scholars[24] and the courts,[25] and such, moreover, appears to be the common understanding of the bar.[26] The peculiar relationship between master and servant, giving rise to a shared liability determined and measured by identical facts, seems to accord with all the substantive requirements of joint liability. The contrary determination of the Vermont court was reached by virtue of essentially only two arguments. The contention, that the vicarious liability of the master is alternative rather than joint, has already been discussed.[16] The validity of the other argument, to the effect that master and servant cannot be jointly liable because they cannot be jointly sued, is dubious both because the clear preponderance of authority establishes the right of joinder in master-servant cases,[27] and because the emphasis placed upon the question

22. Leflar, *Contribution and Indemnity Between Tortfeasors* (1932) 81 U. of Pa. L. Rev. 130, 131 at n. 9.

23. Harper, Torts (1933) §§ 302, 303; I Jaggard, Torts (1895) § 67 p. 209; Cole v. Ducktown Sulphur, Copper and Iron Co., 111 Tenn. 430, 438, 78 S. W. 93, 94 (1903).

This view of joint liability as the more inclusive term is logically neater than an indiscriminate use of the words joinder, joint tortfeasor, and joint liability.

24. 1 Cooley on Torts (4th ed. 1932) § 87; Harper, op. cit. *supra* note 23; Jaggard, op. cit. *supra* note 23; (1917) 30 Harv. L. Rev. 525, 526. See also notes 17, 18, 19, *supra*.

25. Among them are: Schumpert v. Southern Ry. Co., 65 S. C. 332, 43 S. E. 813 (1903); Illinois Central Rr. Co. v. Houchins, 121 Ky. 526, 89 S. W. 530 (1905); Weaver v. Hale, 82 Fla. 88, 89 So. 363 (1921); Lee v. Standard Oil Co., 105 W. Va. 579, 144 S. E. 292 (1928); Skala v. Lehon, 343 Ill. 602, 175 N. E. 832 (1931); Moody v. Hardeman, 44 Ga. App. 676, 162 S. E. 653 (1932); Clark v. Cliffside Park, 110 N. J. L. 589, 166 Atl. 309 (1933).

26. Such is evidenced by the many suits brought against the master and servant jointly and in which the propriety of such joinder is not challenged. Such cases in Vermont include: Gutzwiller v. American Tobacco Co., 97 Vt. 281, 122 Atl. 586 (1923); Ronan v. Turnbull Co., 99 Vt. 280, 131 Atl. 788 (1926); Jewett v. Pudlo, 106 Vt. 249, 172 Atl. 423 (1934); likewise Rolfe v. Boston & Maine Rr., 69 N. H. 476, 45 Atl. 251 (1898).

27. Most of the cases are collected and annotated in Note (1935) 98 A. L. R. 1057. The question has been a nice one and vacillation between the two positions has not been infrequent among the courts of the same state.

It is interesting to note that among the cases cited in support by the Vermont court, three were dicta, two have apparently been overruled, and one [Williams v. Ferrell, 10 Tex. Civ. App. 231, 235, 30 S. W. 450, 451 (1895)] reached the opposite conclusion in a dictum. Of further interest is the fact that this conclusion of the Vermont court is expressly contrary to an earlier dictum of the same court in Brown v. Lent, 20 Vt. 529, 532 (1848).

of joinder is undeserved.[28] The court fails to discriminate between problems of joinder, entirely a procedural matter, and questions of joint liability which are primarily substantive. Joint liability can exist irrespective of whether or not the parties can be joined in one action.[29] Various other reasons have been suggested by other courts why master and servant are neither joint tortfeasors nor jointly liable. The objection that there is diversity in the historical origins of and reasons for the liabilities of master and servant, does not seem material on the issue of whether such liabilities are joint.[30] Some courts have argued that master and servant cannot be joint tortfeasors because the master has a right to indemnity from his negligent servant, whereas the common law rule ordinarily denies contribution as between joint tortfeasors.[31] The fallacy in this contention, as has often been pointed out, lies in the fact that equity will allow indemnity and contribution among joint tortfeasors who are not *in pari delicto*,[32] so that the mere fact that the master may have recovery over against his negligent servant does not necessarily imply that they are not joint tortfeasors. Some courts have perceived another obstacle to the existence of joint liability in the fact that punitive damages may be recovered from negligent servants, whereas non-negligent masters are liable only for compensatory damages.[33] This fact

28. The legal bases for joinder and joint liability are often identical, and likewise joinder and joint liability overlap considerably in their application; yet confusion is inevitable unless it is recognized that joinder may be granted or withheld because of factors wholly irrelevant to the question of joint liability. Before the Codes, the fetish for narrowing a controversy to a single issue and the rigid requirements of the forms of action often prevented joinder of master and servant. Knox v. Redwine, 61 App. D. C. 179, 59 F. (2d) 304 (1932), cert. denied, 287 U. S. 636 (1932). Since the Codes, however, joinder is a matter of procedural convenience and all rights (even alternative ones) arising out of a single set of operative facts may be determined in one action. See Legis. (1936) 21 Corn. L. Q. 371, 372, et seq.

In an able discussion of the analogous contract problem, Merrill, *Election Between Agent and Undisclosed Principal* (1933) 12 Neb. L. Bull. 100, 105, points out that non-joinder "is not necessarily a decision that the third person might not prosecute to judgment separate actions against both principal and agent."

29. Louisville & N. Rr. Co. v. Allen, 67 Fla. 257, 272, 65 So. 8, 12 (1914); 1 Cooley on Torts (4th ed. 1932) § 81, p. 255. Compare also the situations when one of those jointly liable is outside of the jurisdiction and therefore cannot be joined as defendant by the plaintiff. Yet it is true that joint liability is robbed of most of its practical effect if there can be no joinder.

30. It was thought to be compelling, however, in Warax v. Cincinnati N. O. & T. P. Ry. Co., 72 Fed. 637, 643 (C. C. Ky. 1896); Helms v. Northern Pacific Ry. Co., 120 Fed. 389 (C. C. 6th Minn., 1903); but cf. Mayberry v. Northern Pacific Ry. Co., 100 Minn. 79, 81 110 N. W. 356, 357 (1907); Schultz v. Brunhoff Mfg. Co., *supra* note 12.

31. Parsons v. Winchell, 5 Cush. 592 (Mass. 1850); Page v. Parker, 40 N. H. 47 (1860); Gustafson v. Chicago, R. I., & P. Ry. Co., 128 Fed. 85 (C. C. A. W. D. Mo. 1904).

32. See Schumpert v. Southern Ry. Co., *supra* note 25 at 814; Mayberry v. Northern Pacific Ry. Co., 100 Minn. 79, 83, 110 N. W. 356, 357 (1907); Fitzhugh v. Grand Trunk Ry. Co., 80 N. H. 185, 187, 115 Atl. 803, 805 (1921); Skala v. Lehon, *supra* note 25 at 605; Burdick, Law of Torts (4th ed. 1926) 194; 1 Cooley on Torts (4th ed. 1932) § 89; Leflar, op. cit. *supra* note 22; (1921) 30 Yale L. J. 527, 528.

33. See Gustafson v. Chicago, R. I. & Pac. Ry. Co., 128 Fed. 85, 96 (C. C. A. W. D. Mo. 1904).

Yet there is no unanimity among the courts on the subject of whether masters are liable in exemplary damages for the wrongs of their servants. See Bauer, Damages (1919) § 51; Joyce, Damages (1903) §§ 135, 136; Sedgwick, Damages (1912) § 378.

is perhaps the hardest to reconcile with joint liability, but it is not an insurmountable obstacle to finding that such liability exists.[34]

It may be argued as a practical justification of the instant decision that, by restricting plaintiffs to one action, wasteful litigation is eliminated. In reality however, there is little danger of such litigation since suit is customarily brought initially against the supposedly more responsible master; and, if procedural expediency is the objective, it would seem to be more readily achieved by allowing joinder. Despite the putative benefits, several unfortunate consequences appear to be inevitable from the logic of the opinion. In the first place it will be impossible for plaintiffs, denied the privilege of joining resident servants as defendants, to prevent the removal to the federal courts of tort actions brought against non-resident masters. This is objectionable both because it throws into the federal courts a large number of cases with which those courts should not be concerned,[35] and because it tends to thwart the policy, of both federal and state courts, of conserving to the states jurisdiction over matters which are properly theirs. Secondly, the principal holding subjects plaintiffs to the hazards of an election which in many instances may well defeat the demands of justice.

CLASSIFICATIONS IN STATE LEGISLATION UNDER THE EQUAL PROTECTION AND PRIVILEGES AND IMMUNITIES CLAUSES OF THE FOURTEENTH AMENDMENT

PLAINTIFF, a resident of Vermont, was taxed under the Vermont Income and Franchise Tax Act of 1931 on income derived from the ownership of stock in foreign corporations and from loans bearing not more than 5% interest made outside of the state. Because the statute exempted from taxation income received from shares of stock in foreign corporations and from loans bearing not more than 5% interest, when made within the state,[1] plaintiff challenged the validity of the act, contending that it contravened the Fourteenth Amendment to the United States Constitution by denying to him the equal protection of the laws and abridging his privileges and immunities as a citizen of the United States. Mr. Justice Sutherland, speaking for six members of the Supreme Court, declared that the tax on income derived from shares in foreign corporations was not invalid on either of the grounds advanced, since the owners of shares in Vermont corporations were indirectly taxed at approximately the same rate through operation of a state corporate franchise tax. But that part of the statute which taxed income derived from loans bearing not more than 5% interest made outside of the state was held unlawfully discriminatory against the plaintiff because the attempted classification bore no relation to the declared purpose of the statute, the raising of revenue, and because the legislature failed to indicate affirmatively any other purpose which might support the exact

34. This is both because of the conflict of authority on the question of whether the non-negligent master is liable for punitive damages, and further, because of the fact that the assessment of punitive damages against some but not all of the defendants has not been held to be inconsistent with the joint liability of joint tortfeasors. St. Louis & S. W. Ry. Co. of Texas v. Thompson, 102 Tex. 89, 113 S. W. 144 (1908); Davis v. Hearst, 160 Cal. 143, 116 Pac. 530 (1911).

35. See Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499, 523; Frankfurter, *A Note on Diversity Jurisdiction* (1931) 79 U. OF PA. L. REV. 1097; cf. Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936) 45 YALE L. J. 393-395.

1. VT. PUB. LAWS (1933) § 873, II (a), (e).

classification attempted. It was further held that even "assuming that the state of Vermont is benefited . . . and, quite apart from the equal protection of the laws clause," the provision was also unconstitutional in that it imposed a tax upon plaintiff's loan contracts made outside of Vermont while exempting similar contracts made within the state and thus abridged his privileges and immunities as a citizen of the United States to make loan contracts in another state. Mr. Justice Stone, with whom Justices Brandeis and Cardozo joined, strongly urged that the act was constitutional in its entirety.[2]

While the doctrine is well established that a classification must bear a substantial relation to the purpose of the act,[3] the manner in which the rule is applied in the principal case appears to be a marked departure from precedent. Hitherto, a presumption of validity has attached to the acts of a legislature,[4] and the Court has been unwilling in state tax cases analogous to the principal case to hold classifications unconstitutional which could conceivably have borne some relation to a lawful legislative policy, even though the legislature's intent to effect a purpose other than the raising of revenue was not disclosed on the face of the act. Thus, classifications in state tax statutes having as their sole declared purpose the raising of revenue have been upheld where the Court was able to perceive that the legislature had a further and unexpressed intent to aid or to discourage some form of industry in the advancement of public interest.[5] For example, it has been held that butter and oleomargarine are sufficiently different to permit a tax upon the retail sale of the one and not

2. Colgate v. Harvey, 56 Sup. Ct. 252 (1935).

3. See F. S. Royster Guano Co. v. Commonwealth, 253 U. S. 412, 416 (1920); Louisville Gas Co. v. Coleman, 277 U. S. 32, 37 (1928); Heiner v. Donnan, 285 U. S. 312, 332 (1932); Concordia Fire Insurance Co. v. State, 292 U. S. 535, 549 (1934); Stewart Dry Goods Co. v. Lewis, 294 U. S. 550, 566 (1935).

4. See Erb v. Morasch, 177 U. S. 584, 586 (1900); Rast v. Van Deman & Lewis Co., 240 U. S. 342, 357 (1916); Adkins v. Children's Hospital, 261 U. S. 525, 544 (1923); Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co., 284 U. S. 151, 158 (1931); Lawrence v. State Tax Commission, 286 U. S. 276, 283 (1932).

5. State v. Roberts, 171 U. S. 658 (1898); American Sugar Refining Co. v. State, 179 U. S. 89 (1900); Quong Wing v. Kirkendall, 223 U. S. 59 (1912); Citizens' Telephone Company v. Fuller, 229 U. S. 322 (1913); Hammond Packing Co. v. State, 233 U. S. 331 (1914); Rast v. Van Deman & Lewis Co., 240 U. S. 342 (1916); Alaska Fish Salting & By-Products Co. v. Smith, 255 U. S. 44 (1921); Heisler v. Thomas Colliery Co., 260 U. S. 245 (1922); Swiss Oil Corp. v. Shanks, 273 U. S. 407 (1927); Ohio Oil Co. v. Conway, 281 U. S. 146 (1930); Milliken v. United States, 283 U. S. 15 (1931); Lawrence v. State Tax Commission, 286 U. S. 276 (1932); Puget Sound Power & Light Co. v. City of Seattle, 291 U. S. 619 (1934); Fox v. Standard Oil Co., 294 U. S. 87 (1935); Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 285 (1935); see Shaffer v. Carter, 252 U. S. 37, 51 (1920); Watson v. State Comptroller, 254 U. S. 122, 124 (1920); cf. Louisville Gas. Co. v. Coleman, 277 U. S. 32 (1928), at 40; Stimson, *The Stimulation of Industry through Tax Exemption* (1933) 11 TAX MAGAZINE 169. *Contra:* Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32 (1928); Heiner v. Donnan, 285 U. S. 312 (1932); Louis K. Liggett Co. v. Lee, 288 U. S. 517, 535 (1933); cf. Concordia Fire Insurance Co. v. State, 292 U. S. 535, 548 (1934); Stewart Dry Goods Co. v. Lewis, 294, U. S. 550 (1935).

In many jurisdictions, legislation embracing two or more purposes would violate provisions in the state constitution. See Manson, *Drafting of Statute Titles* (1934) 10 IND. L. REV. 155, 156-160. Thus, adoption of a rule by the Court that all of the purposes of an act must be clearly enumerated would impose an additional burden upon many legislatures.

upon that of the other,[6] although it is difficult to perceive what relation, if any, the physical differences between the two objects bear to the acquisition of revenue by a state. Again, such classifications have been sustained where based upon the difference between a herring and some salmon offal,[7] or upon whether an automobile truck is engaged in the transportation of goods produced on a farm or of goods produced elsewhere.[8] Nor could differences in a state tax statute based on the location of grain elevators,[9] previous tax payments by a testator,[10] or methods of accounting[11] or of doing business[12] be said to bear a relation to the expressed purpose of a statute to raise revenue; but they have been sustained. And in upholding such classifications, the Court has consistently held that they need not distribute burdens or benefits within the established classes with a nice, mathematical accuracy.[13] Thus, by taking into consideration the presumption of the validity of the act and the fact that the exemption tended to benefit the state by encouraging an increase of capital available for local loans and a consequent reduction of interest rates within the state, the Court in the principal case might, upon the basis of previous holdings, have sustained the classification.

It is difficult to predict with any degree of certainty what influence this phase of the principal case will exert upon future litigation, for determining the constitutionality of a classification appears to be fundamentally a subjective process,[14] which can not be governed by, or reduced to, legal propositions. The propriety of each classification seems to depend upon a perception by the individual judge of some difference between the things classified[15] which, as measured by his notions of what constitutes sound political theory, bears some reasonable relation to the operation of government.[16] Accordingly, it might be said that the classification attempted in the principal case was unconstitutional simply because a majority of the judges on the Court did not feel that a state ought to deprive a person of property merely because the lawful contract from which the property accrued happened to be consummated in one place and not in another. The only reasonably safe prediction that can be made as to the rule of classification in the principal case is that it will not become a controlling precedent in future cases involving the validity of classifications. To sustain a classification, the court has only to cite such cases as those involving oleomargarine and butter[6] or herring and salmon offal.[7] But if an attempted

6. A. Magnano Co. v. Hamilton, 292 U. S. 40 (1934).

7. Alaska Fish Salting & By-Products Co. v. Smith, 255 U. S. 44 (1921).

8. Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 285 (1935); cf. Heisler v. Thomas Colliery Co., 260 U. S. 245 (1922); Ohio Oil Co. v. Conway, 281 U. S. 146 (1930).

9. W. W. Cargill Co. v. State, 180 U. S. 452 (1901).

10. Watson v. State Comptroller, 254 U. S. 122 (1920).

11. Atlantic Coast Line Rr. Co. v. Daughton, 262 U. S. 413 (1923).

12. Fox v. Standard Oil Co., 294 U. S. 87 (1935).

13. See Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283, 296 (1898); Metropolis Theatre Co. v. City of Chicago, 228 U. S. 61, 69 (1913); Maxwell v. Bugbee, 250 U. S. 525, 543 (1919).

14. See dissenting opinion of Sutherland, J., in State Board of Tax Commissioners v. Jackson, 283 U. S. 527 (1931), at 550.

15. Cf. Opinion of Stone, J., in Puget Sound Power & Light Co. v. City of Seattle, 291 U. S. 619 (1934), at 624.

16. For example, a tax based on obvious differences in hair color or in racial origin would probably be held unconstitutional, because most persons would feel a discrimination based upon such differences to be incompatible with their conception of how government ought to function.

classification should seem undesirable, the Court may very well employ the rule of the principal case as an almost insurmountable barrier in the path of a tax statute.[17]

The principal case also marks the first occasion upon which an act of a state legislature has been held to violate the privileges and immunities clause of the Fourteenth Amendment. The clause was first placed in issue in the *Slaughter-House Cases.*[18] The argument there was that it should be interpreted to bring under federal protection as against the states, and in favor of citizens of the same states, those fundamental, Natural Law rights of persons which by the privileges and immunities clause of Article IV could not be discriminatorily denied by one state to citizens of *another* state.[19] But the Court rejected the argument and so construed the clause as in effect to render it redundant. For the privileges and immunities held by the Court to be protected were those already enjoyed by virtue of the Constitution and statutes enacted thereunder. While the rejected contention in the *Slaughter-House Cases* was later adopted in *Allgeyer v. Louisiana* as a definition of due process of law,[20] previous to the instant case the Court had not mingled the two doctrines. Due process has protected all of those inherent rights of persons, including the right to contract, from legislation which is not reasonable.[21] But where the issue of privileges and immunities under the Fourteenth Amendment has been raised, the Court has rigidly adhered to the doctrine of the *Slaughter-House Cases,* requiring first a proof of national citizenship, and secondly a showing of the violation of the clause by invasion of a right accruing to the individual, as a citizen, by direct provision or by implication from some other part of the Constitution or from a federal statute.[22]

But in the principal case there is an implication that no state may make any discriminations whatsoever against loan contracts formed in other states by its residents, because the making of such loans is a privilege somehow accorded to each citizen by the Constitution. The importation of such absolutism into constitutional doctrine would be unfortunate, especially if the Court chooses to extend the definition of privileges and immunities to include activities which now enjoy protection under the due process clause only as against unreasonable governmental acts. The Court heretofore has used criteria of reasonableness to adapt constitutional doctrines to

17. For example, in 1928, the Court, speaking through Sutherland, J., declared a classification unconstitutional because it bore no relation to the purpose of the act. See Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 39. But in 1930, again speaking through Sutherland, J., the Court did not discuss any relation which the differences between butter and oleomargarine might bear to the purpose of an act to raise revenue. A. Magnano Co. v. Hamilton, 292 U. S. 40.

18. 16 Wall. 36 (U. S. 1873).

19. Cf. Slaughter-House Cases, 16 Wall. 36, 83, 111 (U. S. 1873); Butchers' Union Slaughter-House and Live Stock Landing Co. v. Crescent City Live Stock Landing and Slaughter-House Co., 111 U. S. 746, 754, 760 (1884); Corfield v. Coryell, 6 Fed. Cas. No. 3,230, at 551, 552 (C. C. E. D. Pa. 1825); see McGovney, *Privileges or Immunities Clause—Fourteenth Amendment* (1918) 4 IOWA L. BULL. 219, 227-231.

20. 165 U. S. 578, 589, 590 (1897).

21. Cf. 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 733-754, 1229-1231.

22. See Colgate v. Harvey, 56 Sup. Ct. 252, 266, n. 2 (1935) (full citation of cases); 2 COOLEY, op. cit. *supra* note 21, at 821-824.

In the principal case the Court might easily have escaped all discussion of privileges and immunities by holding that a tax on net income does not place a burden or restriction upon the contract from which the income accrues. Cf. Shaffer v. Carter, 252 U. S. 37 (1920) (tax upon net income derived from interstate commerce is not a burden on interstate commerce).

the demands of a changing society.[23] But if the Court should interpret the principal case to hold that neither public policy nor changing conditions will permit even a reasonable discrimination against the exercise of what the Court henceforth denominates a privilege or immunity derived from national citizenship, the states will suffer a curtailment of power even beyond the limitations imposed by the equal protection and due process clauses. However, the Court in the principal case might have meant simply that the attempted classification unlawfully denied plaintiff the equal protection of the laws and only as a result abridged his privileges and immunities. For it was held that the privileges and immunities of investors in foreign corporations were not abridged by the taxation of income derived from shares of stock of such corporations while exempting income from local corporations because they were "in substance and effect" treated like investors in Vermont corporations. And since it is hardly possible that the tax burden borne by investors in Vermont corporations will be precisely as heavy as the direct burden imposed on investors in foreign corporations, the Court did sustain one discrimination in the instant case based upon whether a contract was formed within or without the state. It might be said, therefore, that the principal case turned solely upon the lawfulness of the classification and that the discussion of privileges and immunities, consequently, was merely surplusage. It is to be hoped that the Court will either adopt this restrictive interpretation of the principal case or introduce into its novel doctrine of a separate protection for privileges and immunities of federal citizenship a qualification of "reasonableness," to mitigate its present apparent absolutism, thereby leaving the states in possession of at least their present power reasonably to subject individual rights to legislation having for its end the promotion of the public interest.[24]

State Estate Taxation of Nonresident Decedents

In *Estate of Emma C. Rueff*,[1] the first case to arise under section 249-p of Article 10C of the New York Tax Law[2] which provides for an estate tax upon the testamentary transfer of nonresidents' real and tangible personal property located in New York, decedent's gross estate, computed as if she were a resident, was $375,883.90. This was composed of $294,472.00 worth of realty and tangible personalty located in New York, and $81,411.90 worth of intangible personalty.[3] Total deductions and exemptions permitted to decedent amounted to $327,655.99,[4] leaving a net taxable estate of $48,227.91. At the base rate of 4/5%,[5] this resulted in a tax of $385.82, which decedent would have paid if she had been a resident. Since decedent was a nonresident, however, it was required that this amount be reduced so that the tax finally payable should bear the same ratio to it as the taxable realty and tangible personalty in New York bore to the total gross estate. Therefore, $385.82 was multiplied by the fraction 294,472.00/375,883.90, and the final tax of $302.86 obtained. Upon appeal the Surrogate Court of New York County held that the tax provision

23. Cf. Dodd, *Adjustment of the Constitution to New Needs* (1936) 22 A. B. A. J. 126.

24. See Editorial, *The Supreme Court Improvises* (1936) 85 New Republic 213.

1. 157 Misc. 680, 284 N. Y. Supp. 426 (Surr. Ct. 1935).

2. New York Tax Law (1930) Art. 10C, § 249-p.

3. These figures are based upon the report of the tax appraiser, and differ slightly from those in the reported case, where the realty and tangible personalty were valued at $297,140 and the intangibles at $78,743.90.

4. Deductions amounted to $314,761.59, and exemptions to $12,894.40.

5. For a schedule of the rates, see New York Tax Law (1930) Art. 10C, § 249-n.

was unconstitutional because it required the inclusion of the nonresident decedent's intangibles in the computation of the tax, and that, furthermore, if the intangibles had been omitted in the computation, the estate would not have been subject to tax since there would have been a deficit instead of a net estate.

It has been held in a line of recent Supreme Court decisions that the due process clause of the Fourteenth Amendment to the United States Constitution forbids any state except the state of decedent's domicile to impose an estate or inheritance tax measured by the amount of the decedent's intangibles.[6] While states taxing estates of nonresident decedents can thus measure the tax only by the real[7] and tangible personal property[8] located within the taxing state, no limitations have been set on the power of a state to establish the proportion of the decedent's deductions and exemptions permitted in calculating the net taxable estate,[9] nor upon the method of computing the tax.[10] The only apparent restriction is that there should be no discrimination against nonresidents by imposing a tax on their estates greater than that levied on similar estates of residents.[11] The most widely adopted method of

6. Farmers Loan and Trust Co. v. Minnesota, 280 U. S. 204 (1930); Baldwin v. Missouri, 281 U. S. 586 (1930); Beidler v. South Carolina Tax Comm., 282 U. S. 1 (1930); First National Bank of Boston v. Maine, 284 U. S. 312 (1932). The trend illustrated by these cases, as well as the unsettled problem whether the state in which the intangibles have a business situs can impose an estate or inheritance tax measured by it, may be found discussed in Brown, *Multiple Taxation by the States—What is Left of It?* (1935) 48 HARV. L. REV. 407; Rottschaefer, *The Power of the States to Tax Intangibles* (1931) 15 MINN. L. REV. 741; Rottschaefer, *State Jurisdiction to Impose Taxes* (1933) 42 YALE L. J. 305; Merrill, *Jurisdiction to Tax—Another Word* (1935) 44 YALE L. J. 582; Rodell, *A Primer on Interstate Taxation* (1935) 44 YALE L. J. 1166.

7. HANDY, INHERITANCE AND OTHER LIKE TAXES (1929) 165; KIDDER, STATE INHERITANCE TAXATION AND TAXABILITY OF TRUSTS (1934) 281; 2 COOLEY, TAXATION (4th ed. 1924) § 447; 1 id. § 92. See also GLEASON AND OTIS, INHERITANCE TAXATION (4th ed. 1925) 545.

8. Frick v. Pennsylvania, 268 U. S. 473 (1925); Comment (1926) 35 YALE L. J. 357; Comment (1927) 36 YALE L. J. 694, and 716; (1925) 25 COL. L. REV. 967; Note (1925) 39 HARV. L. REV. 250.

9. See 3 COOLEY, op. cit. *supra* note 7, § 1159, n. 82. For the practices of the various states, see PINKERTON AND MILLSAPS, INHERITANCE AND ESTATE TAXES (1926) 442-500. In general, the methods fall into two classes: (1) only the debts owed to creditors within the taxing state may be allowed. McDougald v. Low, 164 Cal. 107, 127 Pac. 1027 (1912) (no debts in state and so no deductions permitted). (2) The total of decedent's deductions are prorated according to some statutory scheme. See also HANDY, op. cit. *supra* note 7, at 349.

There may exist some doubt as to whether exemptions must be allowed in full, may be prorated, or need not be allowed at all. Cf. Smith v. Loughman, 245 N. Y. 486, 157 N. E. 753 (1927), 4 COOLEY, op. cit. *supra* note 7, at 3464; PINKERTON AND MILLSAPS, *supra*, at 432; HANDY, *supra*, at 353.

10. For a general discussion of the many methods in use, see PINKERTON AND MILLSAPS, op. cit. *supra* note 9, 424 to 500. As to the Matthews Flat-Rate Plan in more detail, see MATTHEWS, A FLAT-RATE PLAN FOR THE TAXATION OF PERSONAL PROPERTY OF NONRESIDENTS PASSING AT DEATH (1921).

11. Smith v. Loughman, 245 N. Y. 486, 157 N. E. 753 (1927), noted in (1927) 37 YALE L. J. 117, (1928) 26 MICH. L. REV. 457; Commonwealth v. Fleet's Executor, 152 Va. 353, 147 S. E. 468 (1929), cert. denied, 279 U. S. 867 (1929), noted in (1930) 14 MINN. L. REV. 427; cf. In re Cole's Estate, 237 App. Div. 372, 261 N. Y. Supp. 35 (1st Dep't, 1932). *Contra*: Price v. Fox, 220 Ky. 373, 295 S. W. 433 (1926). See also 1 COOLEY, op. cit. *supra* note 7, §§ 250, 341, 356.

nonresident death taxation is to deduct from the realty and tangible personalty located within the taxing state, a proportion of the nonresident's total debts and exemptions, and then to apply against the net estate, thus computed, the usual graduated tax rates used in computing residents' taxes.[12] If this method had been used in the instant case, and the proportion of deductions and exemptions allowable determined by the fraction provided in the statute, the resulting tax would have been precisely the same as that actually produced.[13] For until the graduated tax brackets are reached, the effect of the instant so-called "ratio" method of computation is to cancel out the intangibles and to reduce proportionately the deductions and exemptions permitted.[14] The court in the instant case was thus clearly in error in holding that the intangibles were being included in the measure of the tax.

The objection that the "ratio" method of computation unconstitutionally includes intangibles in the measure of the tax can have validity only when the taxable estate extends into the graduated tax brackets. Since the ratio under the instant statute is not applied until after a tentative tax is computed, the net estate, in relation to which the tax rate is graduated, includes intangibles as well as taxable assets. The result in many instances may be a higher tax rate and consequently a greater final tax than if the ratio had been multiplied first against the total net estate to eliminate the amount of the nontaxable intangibles from the calculation, and the resulting figure had been used to determine the tax rate.[15] However, even though it is un-

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12. For the varying amounts of deductions permitted, see PINKERTON AND MILLSAPS, op. cit. *supra* note 9, at 442, 449, 450, 463, 471, 479, 480.

13. $\$294{,}472.00 \text{ (Taxables)} - \dfrac{\$294{,}472.00 \text{ (Taxables)}}{\$375{,}883.90 \text{ (Gross Estate)}} \times \$327{,}655.99 \text{ (Debts and Exemptions)} = \$37{,}781.67 \times 4/5\% \text{ (tax rate)} = \$302.25 \text{ (\$.61 difference)}.$

14. The effect of these methods can be shown algebraically by the comparison of three computations. A = taxable realty and tangible personalty; B = intangibles; C = decedent's total deductions and exemptions; R = the uniform tax rate.

I. From the taxable realty and tangible personalty subtract the statutory proportion of the debts and exemptions and then apply the tax rate:

$$\left[A - \left(\frac{A}{A+B} \times C\right)\right] \times R = \left[A - \frac{AC}{A+B}\right] \times R$$

II. From the total estate deduct the total debts and exemptions, apply the statutory ratio and then the tax rate:

$$\left[(A + B - C) \times \frac{A}{A+B}\right] \times R = \left[A - \frac{AC}{A+B}\right] \times R$$

III. The instant method: from the total estate deduct the total deductions and exemptions, apply the tax rate and then the statutory ratio:

$$\left[(A + B - C) \times R\right] \times \frac{A}{A+B} = \left[A - \frac{AC}{A+B}\right] \times R$$

15. Assume that the taxable realty and tangible personalty amount to \$100, the intangibles to \$50, the total debts and exemptions to \$45, and that the tax rates are 1% on an estate up to \$70, and 2% on the balance over \$70.

(A) By the first method $(100 - \frac{100}{150} \times 45) = 70$, and by the second method $(100 + 50 - 45) \times \frac{100}{150} = 70$. The estate subject to tax would be \$70, and the tax \$.70.

(B) By the instant method, the tax is \$.93. $100 + 50 - 45 = 105$; $70 \times 1\% = .70$; $35 \times 2\% = .70$; $.70 + .70 = 1.40$; $1.40 \times \frac{100}{150} = \$.93$.

deniable that this New York statute includes intangibles in the figure which determines the *rate* of the tax, it does not necessarily include them in the figure which is made the *measure* of the tax. In *Maxwell v. Bugbee*,[16] the Supreme Court held an identical statute constitutional as applied to an estate which extended into the higher tax brackets. The rule of that case, at least as interpreted in *Frick v. Pennsylvania*,[17] was that property having a foreign situs may be used in the determination of the tax *rate* as distinguished from the *measure* of the tax.[18] Although some of the cases relied upon in the *Bugbee* case have been subsequently overruled,[19] and some doubt has been thrown upon the decision itself,[20] it has never been overruled. Furthermore, even if the rationale of the *Bugbee* case be rejected, on the ground that the distinction between using the intangibles to determine the rate rather than the measure of the tax is arbitrary, the validity of the instant statute can still be upheld. For, since the proportion of deductions and exemptions which may be allowed in arriving at a nonresident decedent's taxable net estate is not limited by constitutional restrictions,[9] it can be argued that the result of the "ratio" method of computation used in the instant statute is to remove all the non-taxable intangibles from the assets taxed, and to subtract only that portion of the deductions and exemptions which would produce a net estate large enough to support the tax obtained.[21]

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16. 250 U. S. 525 (1919) (Holmes, White, Van Devanter, and McReynolds dissenting); (1920) 33 HARV. L. REV. 582; (1920) 14 ILL. L. REV. 661; (1920) 68 U. OF PA. L. REV. 184; (1920) 29 YALE L. J. 464. For a discussion of the method involved, see PINKERTON AND MILLSAPS, op. cit. *supra* note 9, 487-500; also GLEASON AND OTIS, op. cit. *supra* note 7, 636-639.

17. See 268 U. S. 473, 495, 496 (1925).

18. The effect of applying the ratio is to cancel out the intangibles and to reduce proportionately the deductions and exemptions permitted. The final tax is the result of multiplying the rate obtained against the taxable realty and tangible personalty located within the taxing state.

Thus the $.93 tax obtained in footnote 15 (B) would be reached:

$$100 - (2/3 \times 45) = 70; \quad 70 \times 1\frac{23}{70}\% = \$.93.$$

19. Farmer's Loan and Trust Co. v. Minnesota, 280 U. S. 204 (1930) overruled Blackstone v. Miller, 188 U. S. 189 (1903).

20. See Frick v. Pennsylvania, 268 U. S. 473, 495 (1925); cf. City Bank Farmers' Trust Co. v. Bowers, 2 F. Supp. 883, at 888 (S. D. N. Y. 1932) rev'd on other grounds, 68 F. (2d) 909 (C. C. A. 2d, 1934). See also HANDY, op. cit. *supra* note 7, at 350 et seq.; GLEASON AND OTIS, op. cit. *supra* note 7, at 638.

21. Thus, instead of the result being $\left(A - \frac{AC}{A+B}\right)$, it becomes $\left(A - \frac{XC}{A+B}\right)$, X being a variable sufficiently small to reduce C so that the final estate will be large enough to determine the particular tax reached.

So, in footnote 15 (B), the tax of $.93 would be arrived at, in effect:

$$100 - \left(\frac{61.66}{150} \times 45\right) = 100 - 18.5 = 81.5; \quad 70 \times 1\% = .70; \quad 11.5 \times 2\% = .23;$$
$$.70 + .23 = \$.93$$

A tax so large that it could be produced, under this analysis, only by the inclusion of the nontaxable intangibles in the taxable net estate would only occur in unusual circumstances. Thus an estate composed of $200,000 of taxable realty and tangible personalty, $1,000,000 of nontaxable intangibles, and $100,000 of deductions and exemptions would

In the principal case, the estate was not large enough to extend into the graduated tax brackets.[22] The court, however, drew no distinction between the application of the tax law to estates which do not, and to those which do, extend into the graduated brackets. It apparently rested its decision on the ground that the mere inclusion of the intangibles in the gross estate rendered the law invalid. Thus, although only the narrow question of whether the tax statute is unconstitutional as applied to the instant estate need have been considered, the broader ground which the court chose for its decision may result in the appellate court's ruling upon the questions of the constitutionality of the entire statute. Even in the latter event, however, it would seem that, in view of the substantial grounds available for holding that the instant tax statute does not result in the inclusion of nontaxables in the final tax, whether or not the estate extends into the graduated tax brackets, and in view of the fact that the statute is the result of long experimentation by New York to work out a reasonable and administratively convenient method of nonresident death taxation,[23] the tax should be sustained.

RIGHT TO NOTICE AND HEARING BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

THE plaintiff and four other broadcasting companies had been rendering day and night service in the Kansas City area when a sixth company, hitherto only a daytime broadcaster, applied to the Federal Communications Commission for a permit to broadcast also at night. Claiming ability to prove that the granting of the permit would so promote active competition among the broadcasters for listeners, broadcasting material, talent, and advertising revenue that the quality of the radio service offered the public would suffer greatly, the plaintiff sought to intervene in a hearing by the Commission on the application. Upon the denial of its petition, the plaintiff sought an injunction from the Supreme Court of the District of Columbia to restrain the Commission from granting the new permit without giving it a hearing, contending that its denial would deprive him of his property without due process of law. The Commission moved to dismiss the bill of complaint upon the grounds that the plaintiff's license was a mere privilege rather than a property right entitled to protection by a hearing, and that, in any event, the injunction should not be granted, since the plaintiff had an adequate remedy at law by a statutory

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result in an estate subject to tax of $1,100,000, which at the present tax rates and using the instant "ratio" method, would yield a tax of $6,600. The highest possible tax upon the taxable realty and tangible personalty, assuming that none of the deductions or exemptions could be allowed, would be $2000. Thus the intangibles must have been used in the measure of the tax.

However, since it is probable that such estates will be rare, an occasional occurrence should not invalidate an otherwise valid statute. See Smith v. Loughman, 245 N. Y. 486, 495, 157 N. E. 753, 756 (1927).

22. The court, impressed by the fact that if the intangibles were omitted and the other items remained the same there would be no tax, concluded that the inclusion of the intangibles unconstitutionally transformed a deficit into an estate subject to tax. However, the provisions of the "ratio" method are inseparable, and if the intangibles were omitted, another method of computation would have been necessary, whereby the deduction would be reduced proportionately.

23. For a short historical survey, see the note preceding § 248 of Article 10A of the NEW YORK TAX LAW (1928), and also the note under § 248-b. Article 10A was superseded by Article 10C, § 249n et seq. of the TAX LAW of 1930.

appeal to the United States Court of Appeals for the District of Columbia from an order of the Commission granting the application. In a special appeal to the Court of Appeals by the Commission, after the lower court's refusal either to dismiss the complaint or grant the injunction, it was held in a three to two decision, that the bill of complaint should be dismissed since the statutory remedy of appeal to the Court of Appeals, *after* action by the Commission, was not only adequate but exclusive.[1]

The attempt to reconcile the proper protection of individual rights with the pressing need for speed and efficiency in the administration of governmental affairs is a perennial problem of administrative law.[2] In the instant situation, Congress, in entrusting the Federal Communications Commission with the supervision of the country's radio broadcasting systems, has stipulated that the Commission shall have plenary powers over all licensees,[3] that its sole guidepost shall be the "public convenience, interest, or necessity,"[4] and has largely left to the Commission itself the determination of a proper procedure.[5] The statute does provide, however, that no application for a license may be finally denied nor any change made in the existing license, without due notice and a hearing to the parties *primarily* interested.[6] Provision has been made, moreover, for appeals to the Circuit Court of Appeals for the District of Columbia by any person "whose interests are adversely affected by the decision of the Commission,"[7] but nothing is said about the right of such persons to a hearing before the Commission. Since the Commission's findings of fact are conclusive, if supported by substantial evidence in the record, review by the Court is limited to a consideration of the record on questions of law.[7]

While the property of licensees invested in the broadcasting business is subject to the power of the Commission to regulate in the public interest, the exercise of this power arbitrarily without granting directly affected parties an opportunity to be heard in opposition would obviously be prohibited as a deprivation of property without due process of law.[8] If, as the complainant in the principal case claimed,

1. Sykes v. Jenny Wren Co., 78 F. (2d) 729, (App. D. C. 1935), cert. denied, 56 S. Ct. 147 (1935).

A vigorous dissent by Justice Groner, concurred in by Justice Hitz, relies partially on paragraph 59 of the rules of the Commission, which provides that any person may file with the Commission a petition to intervene at a scheduled hearing and that, if the petition discloses a substantial interest in the subject matter of the hearing, the Commission will permit the intervenor to be heard. This rule would seem to refer to such a situation as existed in the instant case, where a hearing was scheduled; but it should be noted that the rule would not control all cases, since the COMMUNICATIONS ACT OF 1934 provides that the Commission need hold no hearing before granting an application for a new, or modification of an old, license. 48 STAT. 1085 (1934), 47 U. S. C. A. § 309 (1934). Thus, where the Commission has not scheduled a hearing on an application, paragraph 59 would have no application.

2. WHARTON, ADMINISTRATIVE TRIBUNALS (1933); Black, *Does Due Process of Law Require an Advance Notice and Hearing Before a License Is Issued Under the Agricultural Adjustment Act?* (1935) 2 U. OF CHI. L. REV. 270.

3. See 48 STAT. 1082 (1934), 47 U. S. C. A. § 303 (1934).

4. See 48 STAT. 1083 (1934), 47 U. S. C. A. § 307 (1934).

5. See 48 STAT. 1066 (j) (1934), 47 U. S. C. A. § 154 (j) (1934).

6. 48 STAT. 1085 (1934), 47 U. S. C. A. § 309 (1934); 48 STAT. 1087 (1934), 47 U. S. C. A. § 312 (1934).

7. 48 STAT. 1093 (b, c, d, e, f) (1934), 47 U. S. C. A. § 402 (b, c, d, e, f) (1934).

8. See Journal Co. v. Federal Radio Commission, 48 F. (2d) 461 (App. D. C. 1931); (1922) 80 U. OF PA. L. REV. 87.

it could have proved that the granting of the application by the Commission would result in so seriously diminishing its income that it would be forced out of business, it may be contended that it had a legal interest in the subject matter of the hearing, and was constitutionally entitled to be heard. By analogy, it may be pointed out that the courts have held that the Commission must allow a hearing to a complaining station which is being physically affected by an order issued to another station, as, for example, by a permitted increase in power which is drowning out the complainant on the same wave length.[9] And although greater difficulty would be involved in proving the contention of impending destruction by competition, made in the instant case, that would not seem to be adequate reason for applying a different rule.

Nevertheless, the statute itself does not expressly require the Commission to grant a hearing to persons not *primarily* interested. And while a broadcaster whose license is about to be revoked or altered,[10] or whose effective service area is to be curtailed by the granting of permission to another station to operate on the same wave length,[8] is constitutionally entitled to be heard in opposition to such action, it does not necessarily follow that a broadcaster whose privilege to operate may become less valuable because of the increased competition of a new station seeking a permit, or of a competitor seeking an extended time allotment, has the same right. The granting of a license by an administrative body permitting entrance into a field of business, which in the absence of governmental regulation would be open to all, can hardly be considered a deprivation of an established broadcaster's property. The government, by undertaking the regulation of the field, can not be held to guarantee any station against the effects of mere competition. Nor, of course, can the complainant claim a constitutional right to appear and contest a proposed course of action by the Commission on the ground that such action would be harmful to the public interest.

But, even assuming that the present petitioner had a constitutional right to intervene and be heard in the hearing before the Commission, the decision of the court may be held sound. For, although the statute provides no method of direct appeal from a denial by the Commission of a hearing to a petitioner, he may appeal from the final order of the Commission, if his interests are adversely affected by it. And on such an appeal he could presumably raise the identical questions raised in the present bill for an injunction, since the court is given complete power to review questions of law. Then, if the court should determine that the petitioner had a "substantial interest" in the proceeding within the meaning of paragraph 59 of the rules of the Commission, or that the terms of the statute charging the Commission with the responsibility of protecting the public interest required that it hear all evidence bearing on the issue raised by the petitioner, or that the plaintiff had such a legal interest in the subject matter of the hearing as entitled him constitutionally to be heard, the court might reverse and remand the proceedings to the Commission with instructions to allow the petitioner to intervene and introduce evidence.[11]

The decision may, however, be construed to mean that the Commission need

9. Journal Co. v. Federal Radio Commission, 48 F. (2d) 461 (App. D. C. 1931); (1931) 10 TEX. L. REV. 111; see Chicago Federation of Labor v. Federal Radio Commission, 41 F. (2d) 422 (App. D. C. 1930).

10. Westinghouse Elec. & Mfg. Co. v. Federal Radio Commission, 47 F. (2d) 415 (App. D. C. 1931); Courier-Journal Co. v. Federal Radio Commission, 46 F. (2d) 614 (App. D. S. 1931). Such a broadcaster is included within the formula of a person "primarily interested."

11. Journal Co. v. Federal Radio Commission, 48 F. (2d) 461 (App. D. C. 1931).

never allow a hearing to those parties so indirectly affected by a proposed course of action as the plaintiff in the principal case.[12] Yet, unless the Commission at some time grants such a complainant a hearing in which to offer testimony and to cross-examine the opposition, his statutory right to appeal to the court, on the ground that the decision is arbitrary or contrary to the public interest, would seem to be of little value. For, since the court's consideration of fact is limited to the testimony in the record, and the Commission's findings of fact, although formulated without the proffered opposing testimony, are deemed conclusive unless clearly arbitrary, it would seem practically impossible, in a case where the facts appealed on are not in the record, for the court to find legal grounds sufficient to warrant a reversal of the Commission's decision. It would seem, moreover, that a hearing by the Commission should be adapted to the consequences that are to follow it—to the attack and the review to which the orders will be subject.[13] A limited judicial review such as the one under the instant statute, if no hearing before the Commission was granted, would probably not satisfy the constitutional requirement of due process, were the complainant entitled to such protection.[14] Moreover, although the statute, in its express terms, allows such a party as the present plaintiff solely the right to such a judicial review, it is apparent that Congress did intend to give such parties some protection, however gratuitously. Consequently, it would seem that such an intention should be made effective in the interpretation of the statute.

Liability for Workmen's Compensation When the Injured Employee Dismisses His Action Against the Third Party Tort-feasor

An employee in the District of Columbia, eligible for workmen's compensation under the Longshoremen's and Harbor Workers' Act[1] was injured when his truck collided with a street car. After giving due notice to the compensation commission, he sued the street railway and obtained a verdict for damages, which on appeal, was reversed and remanded for a new trial on the ground that the plaintiff was guilty of contributory negligence.[2] Unable and unwilling to bear the expense of a new trial which was certain to result in a directed verdict against him, the injured employee dismissed his tort action and applied for workmen's compensation. Meanwhile, the statute of limitations had run on the original cause of action against the street railway company, thus eliminating any possibility that another negligence suit might be brought by the employer. The deputy commissioner refused to award compensation, and the District Supreme Court and the Court of Appeals sustained his decision on

12. Apparently this construction of the decision was in the minds of the dissenting judges, who speak of the remedy of appeal as "the equivalent of locking the stable door after the horse is gone." Unless this be the proper construction of the decision, the position taken by the dissent seems indefensible since a remission of the proceedings for a rehearing, including a hearing of the petitioner, would seem to be a completely adequate remedy.

13. Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294 (1933); Note (1934) 34 Col. L. Rev. 332.

14. See (1931) 10 Tex. L. Rev. 111.

1. 44 Stat. 1424 (1927), 33 U. S. C. A. § 901 (1935). This Act was made applicable in 1928 to "every person carrying on any employment in the District of Columbia." 45 Stat. 600 (1928), 33 U. S. C. A. § 901n (1935).

2. The appellate court indicated that the trial judge should have directed a verdict for the defendant. Nevertheless the appellate court was required by the rule of Slocum v. New York Life Ins. Co. 228 U. S. 364 (1913) to remand the case for further proceedings. See (1935) 45 Yale L. J. 166.

the ground that the claimant had forfeited his right to compensation by depriving the employer of any opportunity to recoup his compensation payments by suing as assignee of the injured man's cause of action against the tortfeasor. On certiorari, the United States Supreme Court reversed, holding that since the position of the employer's insurer, the real defendant in this suit, was that of a compensated surety, it was only discharged to the extent to which it had been injured by the loss of its right to be subrogated. Since it had failed to prove that subrogation would have enabled it to recover anything, it could show no damage and was therefore not relieved of any part of its duty to pay compensation.[3]

Under the Longshoremen's and Harbor Workers' Act, when a workman acting in the scope of his employment is injured through the negligence of someone other than his employer, the workman has the option of claiming compensation or bringing a tort action against the third person.[4] If he accepts compensation, his cause of action is assigned to the employer, who may sue the negligent party to recover back his outlay in compensation together with such additional damages as can be obtained for the benefit of the injured workman. If the employee notifies the Commission that he will sue the third party, the employer is still liable to the employee for the deficiency if the damages recovered in the suit against the tortfeasor amount to less than would have been payable to the employee as compensation. A recent decision of the Circuit Court of Appeals for the Second Circuit in *American Lumbermen's Mutual Casualty Co. v. Lowe* held that there was nothing in this act which prevented an employee from abandoning a third-party action which he had begun and claiming compensation in full.[5] In so holding, the court expressly rejected the New York doctrine to the effect that, once the employee has elected to sue the negligent party, his right to compensation has been abandoned and his right to a deficiency contribution from the employer does not accrue until he has pursued his common-law remedy to final judgment.[6] However, the language of the *Lowe* case indicated that if the dismissal of the action is prejudicial to the employer's remedy by subrogation, then the election to sue the third party has become unalterable and compensation cannot be claimed. This latter dicta was the basis of the decision below in the principal case. The Supreme Court likewise accepted this view, though it concluded that the failure to prosecute a claim which has been demonstrated to be groundless was not prejudicial. Inasmuch as the only defense based on injury to the employer's right of subrogation, which is made available to the employer by the Act is proof that the employee made a "compromise" with the negligent party without the employer's consent, it would seem that the court went beyond the statute[7] in suggesting the availability of other defenses. Although "compromise" might conceivably be extended to include fraud and collusion between employee and tort-feasor, it would not seem to include mere lack of diligence in prosecuting the claim.

Where the employee is given the option of attempting to recover from the third party before claiming compensation, many compensation statutes attempt to guard the employer against the possibility of prejudice to his right of subrogation by

3. Chapman v. Hoage, 56 S. Ct. 333 (1936), rev'g 78 F. (2d) 233 (1935). The suit against the third party tort-feasor is Washington Ry. & Elec. Co. v. Chapman, 65 F. (2d) 486 (1933).

4. § 33, 44 STAT. 1440 (1927), 33 U. S. C. A. § 933 (1935).

5. 70 F. (2d) 616 (C. C. A. 2d, 1934).

6. Matter of Breitel v. Hinderstein, 261 N. Y. 556, 185 N. E. 736 (1933); Sciacia's case, 262 Mass. 531, 160 N. E. 310 (1928) [overruled by statute in 1929, c. 326 § 1, GEN. LAWS MASS. c. 152, § 15 (1932)].

7. § 33 (g), 44 STAT. 1440 (1927), 33 U. S. A. § 933 (g) (1935).

various provisions declaring compromises to be ineffective,[8] by allowing the employer to intervene in the employee's action,[9] by depriving the employee of his right against his employer where he fails to proceed promptly against the tortfeasor,[10] and by the doctrine of final election.[11] At times the state courts have applied these safeguards more rigidly than the protection of the employer would seem to require.[12] Under the Longshoremen's Act, no binding precedent has yet been established for the discharge of the duty to pay compensation on the ground of prejudice to the employer's right of subrogation, for the principal case, like the *Lowe* decision, resulted in favor of the claimant. In order to carry out the purpose of giving the injured workman certain and speedy relief it would seem preferable that the courts definitely reject that theory. The more defenses that are allowed, the more probable it becomes that the claimant will be forced to engage in prolonged litigation in order to vindicate his right to compensation, just as the petitioner had to do in the instant case. If the protection for the employer is desired, a better solution would be to permit his intervention in the third-party action.[13] Moreover, it is improbable that a workman who has chosen to try his common law remedy first will prejudice his employer. The interest of the employee is to prosecute the action against the tort-feasor as vigorously as possible. If he did not intend to do so, he could much more easily have accepted compensation in the first place. The fact that the statute expressly allows the workman this option indicates an intention that the employer or insurance company shall bear the risks which might normally be entitled thereby, such as the possibility that the employee might not retain as good a lawyer or be able to afford as costly a course of litigation as could the employer or insurance company if allowed to bring the action.[14] Moreover, the fact

8. ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 1435; CAL. GEN. LAWS (Deering, 1931) 4749, § 26; CONN. GEN. STAT. (1930) § 5231; IOWA CODE (1935) § 1382 (3); ME. REV. STAT. (1930) c. 55, § 24; OKLA. STAT. ANN. (1931) § 13368.

9. CAL. GEN. LAWS (Deering, 1931) 4749, § 26; CONN. GEN. STAT. (1930) § 5231; LA. GEN. STAT. (Dart, 1932) § 4397 (2); WIS. STAT. (1931) § 102.29.

10. IOWA CODE (1935) § 1382 (2); ME. REV. STAT. (1930) c. 55, § 24.

11. DEL. LAWS (1917) v. 29, c. 233, § 131; MICH. COMP. LAWS (1929) § 8454; N. Y. WORKMEN'S COMPENSATION LAW (1922) § 29; TEX. CIV. STATS. ANN. (Vernon, 1926) Art. 8307, § 6a; cf. MASS. GEN. LAWS (1932) c. 152, § 15.

12. Roth v. Harlem Funeral Car Co., 278 N. Y. Supp. 452 (App. Div. 3d Dept. 1935); Employers' Indemnity Corp. v. Felter, 277 S. W. 376 (Tex. Com. App. 1925) (insurance carrier discharged because of prejudice to its right to be subrogated, although a jury had found no liability in the third party). But cf. Matter of Burmester v. DeLucia, 263 N. Y. 315, 189 N. E. 231 (1934) (employer held to have waived the defense that claimant elected to sue third party); Patterson v. O'Neil, 151 Minn. 15, 185 N. W. 948 (1921) (employer not discharged by prejudice to his right to be subrogated unless the settlement between claimant and third party was collusive).

13. See note 9, *supra*. Neither the Compensation Act nor the District of Columbia Code at present contains any provision giving the employer a right to intervene in this type of action at law. However, under the broader intervention statutes existing in some states, the employer should have sufficient "interest" to be allowed to join. Cf. Empson v. Aetna Casualty & Surety Co., 71 Colo. 282, 206 Pac. 378 (1922); Stratford Arms Hotel Co. v. General Casualty & Surety Co., 249 Mich. 518, 229 N. W. 506 (1930); see Moore and Levi, *Federal Intervention* (1936) 45 YALE L. J. 465.

14. In the principal case the insurer's brief argued that it was prejudiced at the outset when it was deprived of the right to try the third party action with its own counsel in its own way. The opinion of the court made no reference to this, but concluded that the insurer had not shown that it was prejudiced.

that the Longshoremen's Act, which is of comparatively recent origin, does not by its terms impose any of the restrictions found in the various state statutes except the one provision relating to unauthorized compromises, seems to indicate that Congress did not intend to place any limitations other than that mentioned in the way of the recovery of compensation.

RIGHT OF TRUSTEE IN BANKRUPTCY TO FUTURE DISABILITY BENEFITS UNDER AN INSURANCE POLICY.

BANKRUPT held a life insurance policy with a supplementary contract attached thereto providing for monthly payments to the insured if he should suffer total and permanent disability. The disability occurred several years before bankruptcy proceedings had been instituted. Although admitting that the life insurance policy and its cash surrender value were exempt under the Tennessee exemption statute, and therefore were not subject to the bankruptcy proceedings, the trustee in bankruptcy refused to allow exemption to the disability payments, and therefore included the bankrupt's claim thereto against the insurance company among the assets of the estate. On appeal by the bankrupt from the trustee's order, the United States Supreme Court[1] affirmed the judgments of the lower courts[2] sustaining the action of the trustee on the ground that, since the disability contract was not life insurance but was in essence an annuity purchased and paid for prior to adjudication, the insurance proviso of Section 70 (a) (5) of the Bankkruptcy Act[3] was inapplicable.

The interpretation of the proviso of Section 70 (a) (5), relating to the status of insurance policies as assets of the bankrupt estate, has given rise to a number of perplexing problems.[4] In resolving these problems, the Supreme Court has, wherever possible, and even at the risk of apparent inconsistencies, arrived at results favorable to the bankrupt. Thus, when the effect of state statutes exempting policies having a cash surrender value was presented for determination,[5] it was held that the proviso of Section 70 (a) (5) was subordinate to the general provisions of the Bankruptcy Act and that, therefore, Section 6,[6] which expressly allows exemptions provided by state laws, was controlling. In a subsequent case,[7] however, the Court, while again reaching a result favorable to the bankrupt, apparently departed from this construc-

1. Legg v. St. John, 56 Sup. Ct. 336 (1936).

2. The opinion of the Circuit Court of Appeals is reported in 76 F. (2d) 841 (C. C. A. 6th, 1935).

3. 30 STAT. 565 (1898), 11 U. S. C. A. § 110 (a) (5) (1926): ". . . When any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

4. For general treatment see 3 REMINGTON, BANKRUPTCY (3d ed. 1923) §§ 1243-1263; Grubbs, *Rights of Trustee in Bankruptcy in Life Insurance Policies* (1915) 2 VA. L. REV. 425; Burnett, *Life Insurance as an Asset in Bankruptcy* (1918) 3 CORN. L. Q. 253; Note (1913) 13 COL. L. REV. 625.

5. Holden v. Stratton, 198 U. S. 202 (1905).

6. 30 STAT. 548 (1898), 11 U. S. C. A. § 24 (1926).

7. Burlingham v. Crouse, 228 U. S. 459 (1913). See also Everett v. Judson, 228 U. S. 474 (1913); Andrews v. Partridge, 228 U. S. 479 (1913).

tion of the proviso. Here the trustee was held to be entitled to nothing beyond the cash surrender value of an insurance policy, on the theory that the insurance proviso had the force of additional legislation independent of the general terms of Section 70 (a) (5), which grant to the trustee any property transferable by the bankrupt or subject to levy or to sale under judicial process.[8] This policy of liberal construction was undoubtedly actuated by the consideration that to deprive the bankrupt of his insurance altogether might make it impossible for him to replace it in view of higher premium rates due to advancing years and a possible change in health.[9]

While similar considerations are involved in the present case, since the disability benefits are in lieu of earnings and would presumably furnish the bankrupt's sole means of subsistence, the decision seems legally sound. For, future disability payments would seem to fall squarely within the general terms of Section 70 (a) (5). They are clearly capable of alienation by the bankrupt prior to the filing of the petition[10] and are generally held to be subject to attachment by creditors.[11] It may, however, be argued that the insurance proviso, since the all inclusive phrase "any insurance policy" is employed therein, is not limited in its scope to life insurance and may plausibly be deemed applicable to disability contracts. On this theory, disability contracts should be exempt because they have no cash surrender value as a recognized incident.[12] But this theory disregards the fact that the proviso applies only in the case where the policy has not yet matured before the filing of the petition in bankruptcy. It can have no application if the conditions consummating the insurer's liability, such as death, a stipulated efflux of time, or, as in the instant case, disability, have transpired before bankruptcy, since, then, the bankrupt insured or the beneficiary of the policy possesses an absolute right to payment, which passes to the trustee as assets of the bankrupt.

It may be contended further that the future disability payments are in the nature of future earnings or after-acquired property and are, therefore, immune from demands of the creditors.[13] But while these payments are in lieu of future earnings and are equally worthy of exemption, they do not, otherwise, present any similarities from a legal standpoint. They are not contingent on any future efforts of the bankrupt and his rights to them have already matured before bankruptcy, thus con-

8. In Cohen v. Samuels, 245 U. S. 50 (1917), the Supreme Court again limited the force of the proviso and determined that it must be considered in conjunction with the subdivisions of Section 70 (a). It was there held that the cash surrender value of a policy payable to certain relatives of the insured bankrupt but reserving to him the unqualified right to change the beneficiaries, passed to the trustee in bankruptcy. The result, although adverse to the interests of the insured, was necessary, however, in order to prevent prospective bankrupts from employing the insurance policy as "a shelter for valuable assets and . . . a refuge for fraud."

9. See Burlingham v. Crouse, 228 U. S. 459, 473 (1913); Local Loan Co. v. Hunt, 292 U. S. 234, 244 (1934).

10. In re Matschke, 193 Fed. 284 (E. D. N. Y. 1912). The disability contract itself permitted transfer of the payments to any person designated by the insured.

11. Chattanooga Sewer Pipe Works v. Dumler, 153 Miss. 276, 120 So. 450 (1929); Herbach v. Herbach, 148 Misc. 33, 265 N. Y. Supp. 144 (N. Y. City Ct. 1933); Lion Credit Union v. Gutman, 148 Misc. 620, 265 N. Y. Supp. 479 (N. Y. City Ct. 1933).

12. See Hunter and Phillips, Disability Benefits in Life Insurance Policies (1932) 35.

13. Local Loan Co. v. Hunt, 292 U. S. 234 (1934) (statutory lien created by assignment of future wages held discharged by bankruptcy); Gilbert's Collier, Bankruptcy (3d ed. 1934) § 1453.

stituting an asset of distinct value to his creditors. The eventualities of recovery from disability or of death, which will terminate the liability of the insurer, are at most conditions subsequent creating merely an uncertainty as to the length of time during which payments will be made.[14]

The seeming inevitability of the ruling in the present case as a matter of legal principle indicates the necessity for prompt legislative action to obviate the harsh results of its operation in subsequent cases. Statutes have already been enacted in a number of states expressly exempting disability benefits.[15] Such statutes, however, cannot operate retroactively, and therefore apply only to creditors whose claims arose subsequent to the effective date of the statutes.[16] It would seem more desirable, therefore, that an amendment to the Bankruptcy Act should be passed, since such an amendment would not be subject to the same limitations.

RIGHT OF DEFRAUDED NATIONAL BANK STOCKHOLDER TO RESCIND AND SHARE AS CREDITOR AT INSOLVENCY

PLAINTIFF alleged that in 1928 and again in 1930 he was induced to purchase stock in a national bank by the fraudulent misrepresentations of its officers. In 1931, the Comptroller of the Currency took over the affairs of the bank and appointed a receiver who refused to allow plaintiff to rescind his stock subscriptions. After paying his statutory assessment, plaintiff, in 1935, brought a bill in equity against the bank and the receiver to rescind his purchases of stock, to establish a claim for the price paid therefor and the assessment collected, and to be granted the right to participate as a creditor in the distribution of the assets of the bank. The receiver's motion to dismiss the bill was granted.[1] The court held that, even though plaintiff had paid his statutory assessment, it would be inequitable to allow him to share in the assets along with the depositors and other creditors, and moreover, even if he would originally have been entitled to relief, his delay in filing his claim was such as to estop him from suing to rescind. The plaintiff's claim that he was also entitled to recover the assessment he had paid was hardly deemed worthy of consideration.

In cases similar to the instant one there are two distinct problems involved. The first concerns the statutory assessment; the second concerns the right to rescind the stock subscription and recover the purchase price. In the federal courts, it is now uniformly held that a national bank stockholder cannot set up fraud as a defense to an action to collect an assessment.[2] The plaintiff in the instant case recognized

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14. The fact that the interest of the bankrupt in property is defeasible and contingent does not prevent it from passing to the trustee in bankruptcy. In re Wright, 157 Fed. 544 (C. C. A. 2d, 1907); In re Matschke, 193 Fed. 284 (E. D. N. Y. 1912); In re Evans 253 Fed. 276 (D. Tenn. 1918); BLACK, BANKRUPTCY (2d ed. 1930) 265. Ruvinsky v. Shonberg, N. Y. L. J., Sept. 10, 1935, at 713 seems to be the only instance where the bankrupt was permitted to retain the disability benefits on the ground that they constituted after-acquired property.

15. ARK. ACTS 1933, no. 102, p. 321; MISS. CODE ANN. (Supp. 1933) § 1755; NEB. COMP. STATS. (Supp. 1935) ch. 44, § 1130; N. Y. INS. LAW (1935) § 55b; PA. STATS. ANN. (Purdon Supp. 1935) tit. 40 § 766. See Note (1934) 4 BROOKLYN L. REV. 57, 69.

16. W. B. Worthen Co. v. Thomas, 292 U. S. 426 (1934); In re Rechtman, 11 F. Supp. 347 (E. D. N. Y. 1935); Horowitz v. Weinberg, 156 Misc. 629, 281 N. Y. Supp. 644 (Sup. Ct. 1934); see Note (1934) 4 BROOKLYN L. REV. 57, 70.

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1. Bailen v. Dietrick, 12 F. Supp. 602 (D. Mass. 1935).

2. Scott v. Deweese, 181 U. S. 202 (1901); Lantry v. Wallace, 182 U. S. 536 (1901);

this rule but attempted to avoid its application by arguing that its only purpose was to facilitate the speedy collection of assessments, and that once they had been paid, an independent action might be brought to establish the fraud and recover the assessments. This argument, however, disregards the fact that the purpose of the rule is not, for example, merely that of the superficially analogous rule against enjoining tax collections, which is only intended to expedite payments to the government. The purpose, rather, is to protect depositors by the effective imposition of an additional liability to which all persons who knowingly[3] become stockholders of a national bank are subjected by statute.[4] Furthermore, the prospective stockholder is best able to protect himself against the fraudulent misrepresentations of the bank officers in procuring stock subscriptions, and may well be held to assume the loss incurred by failure so to protect himself. And if there are not sufficient assets of the defunct bank to satisfy all the claims of the creditors, the depositors in most cases have no way of recouping their loss. The defrauded stockholder, on the other hand, has a right of action against the defrauding officers of the bank who may be able to satisfy a judgment procured against them.[5] Thus, both from the standpoint of the equities involved and from that of legislative intent, it would seem that the court was justified in holding that a national bank stockholder's statutory liability is absolute, both as regards liability to suit for the assessment, and disability to recover the assessment once paid.[6]

Anderson v. Cronkleton, 32 F. (2d) 170 (C. C. A. 8th, 1929); Rawlings v. Meredith, 80 F. (2d) 254 (C. C. A. 5th, 1935), rev'g 7 F. Supp. 984 (S. D. Ala. 1934). A few early decisions, however, held that fraud was a defense. Newton Nat. Bank v. Newbegin, 74 Fed. 135 (C. C. A. 8th, 1896); Wallace v. Bacon, 86 Fed. 553 (C. C. S. D. Cal. 1898); Stufflebeam v. De Lashmutt, 101 Fed. 367 (C. C. D. Ore. 1900).

3. A person to whom stock is transferred on the books of the bank without his knowledge or consent will not be liable for an assessment, provided, however, that he did not affirm the transaction. See Keyser v. Hitz, 133 U. S. 138, 149 (1890); Finn v. Brown, 142 U. S. 56, 67 (1891).

4. See 13 Stat. 102 (1866), 12 U. S. C. A. § 63 (1927); 38 Stat. 273 (1915), 12 U. S. C. A. § 64 (1927); cf. Note (1931) 65 U. S. L. Rev. 291; Comment (1932) 41 Yale L. J. 583.

5. Dennis v. Thomson, 240 Ky. 727, 43 S. W. (2d) 18 (1931); see Scott v. Deweese, 181 U. S. 202, 213 (1901); cf. Note (1932) 7 Notre Dame Lawy. 527 (personal liability of bank officer for falsely misrepresenting condition of bank to prospective depositors).

6. Most of the state statutes imposing additional liability upon bank stockholders are similar to the federal statute. See Tex. Rev. Stat. Ann. (Vernon, 1935) art. 535; Wash. Rev. Stat. Ann. (Remington, 1932) § 3242; cf. Gane, *The Liability of State Bank Shareholders in Illinois* (1936) 30 Ill. L. Rev. 743. The state courts usually follow the federal rule in holding that fraud is not a defense to an action to collect a statutory assessment. Commissioner of Banks v. Cosmopolitan Trust Co., 253 Mass. 205, 148 N. E. 609 (1925); Baumgardner v. Fulton, 48 Ohio App. 5, 192 N. E. 349 (1934); Smith v. Groesbeck, 54 S. D. 350, 223 N. W. 308 (1929); Roe v. Pack, 175 S. E. 337 (W. Va. 1934). *Contra:* Hood v. Martin, 203 N. C. 620, 166 S. E. 793 (1932); cf. First Nat. Bank of Calexico v. Thompson, 212 Cal. 388, 298 Pac. 808 (1931). One of two possible lines of reasoning is usually employed to bring about the result in the latter line of cases. The first, while admitting that the person against whom the assessment was levied became a stockholder, holds that the liability imposed by the statute is not absolute, and therefore that fraud can be set up as a defense. Hood v. Paddison, 206 N. C. 631, 175 S. E. 105 (1934). The second line of reasoning, however, is based upon the holding that the fraud in procuring the subscription rendered the transaction absolutely void; that the person sought to be

The question of whether a defrauded stockholder can, after insolvency,[7] rescind his subscription and establish a claim for the purchase price, however, presents a different problem. For, the situation is then governed, not by statute, but by the general case law applicable to all corporations.[8] Despite the seeming confusion of applicable judicial doctrine, there are certain factors common to the decisions. Nearly all repeat what they consider to be the established rule in this country, that insolvency in itself does not bar a stockholder's right to rescind for fraud.[9] And in determining whether to allow rescission, certain factors receive repeated consideration, namely: the length of time which has elapsed since the making of the stock subscription; the degree of diligence on the part of the defrauded subscriber, either in discovering the fraud, or in taking steps to rescind after its discovery; the extent of active participation, if any, by the stockholder in the management of the corporation; and the amount of indebtedness remaining unpaid which has been incurred by the corporation since the subscription was made.[10] This general corporation law has been applied to insolvent banks with the result that in some cases a defrauded stockholder who has paid his statutory assessment has been allowed to rescind and file a claim for the purchase price of the stock.[11] In other cases rescission has been allowed even though the assessment had not been paid, but the decisions expressly left open the question as to whether or not the defrauded stockholder would be liable if an action were subsequently brought to enforce the statutory liability.[12]

charged never became a stockholder; and therefore the statute did not apply. Chapman v. Penix, 274 S. W. 187 (Tex. Civ. App. 1925); cf. Johnson v. Freid, 181 Minn. 316, 232 N. W. 519 (1930). But cf. Chandler v. Miller, 172 Wash. 252, 19 P. (2d) 1108 (1933).

7. There is no question but that a defrauded stockholder can rescind before insolvency. See Fletcher, CORPORATIONS (Rev. ed. 1931) § 1680 et seq.; cf. Depositors Bond Co. v. Christensen, 53 P. (2d) 312 (Wash. 1936). And insolvency, for the purposes of this rule, means actual proceedings in insolvency, and not merely insolvency in fact. Hinckley v. Oil & Pipe Line Co., 132 Iowa 396, 107 N. W. 629 (1906); Fear v. Bartlett, 81 Md. 435, 32 Atl. 322 (1895).

8. It is undoubtedly true, however, that the law applicable to statutory assessments has a pronounced effect upon the attitude of the courts in regard to suits to rescind bank stock subscriptions. See the principal case, *supra* note 1, at p. 604.

9. Julian v. Stewart, 56 F. (2d) 32 (C. C. A. 5th, 1932); In re Bancunity Corp., 36 F. (2d) 595 (S. D. N. Y. 1929); Cawthon v. Bancokentucky Co., 52 F. (2d) 850 (W. D. Ky. 1931); Gress v. Knight, 135 Ga. 60, 68 S. E. 834 (1910). The English rule, and the rule throughout the British Empire, is that the institution of insolvency or winding-up proceedings operates as an absolute bar to rescission for fraud. See Note (1926) 41 A. L. R. 674, and cases there cited.

10. Courts usually distinguish between indebtedness incurred before the stock subscription and that incurred thereafter, allowing rescission as to prior creditors but not as to creditors who became such subsequent to the stock subscription. See Ratcliff v. Clendenin, 232 Fed. 61 (C. C. A. 8th, 1916); Jagels v. Cox, 50 Idaho 67, 294 Pac. 515 (1930); Lex v. Selway Steel Corp., 203 Iowa 792, 206 N. W. 586 (1925); Burningham v. Burke, 67 Utah 90, 245 Pac. 977 (1926); Goodin v. Palace Store Co., 164 Wash. 625, 4 P. (2d) 493 (1931). The reason given for this distinction is that the subsequent creditors have relied upon the stock subscription.

11. Salter v. Williams, 244 Fed. 126 (C. C. A. 3d, 1917); Williams v. Green, 23 F. (2d) 796 (C. C. A. 4th, 1928); cf. Newton Nat. Bank v. Newbegin, 74 Fed. 135 (C. C. A. 8th, 1896); Green v. Stone, 205 Ala. 381, 87 So. 862 (1920); Litchfield Bank v. Peck, 29 Conn. 384 (1860). But cf. Akers v. Radford State Bank, 153 Va. 1, 149 S. E. 528 (1929), noted in (1929) 16 VA. L. REV. 209.

12. Florida Land & Improvement Co. v. Merrill, 52 Fed. 77 (C. C. A. 5th, 1892); Robinson v. Dickey, 14 Tex. Civ. App. 70, 36 S. W. 499 (1896).

Deciding that a defrauded stockholder may rescind and recover the purchase price, however, does not dispose of a case. For, when a corporation has become insolvent, it is no longer a question of stockholders on the one hand and creditors on the other. All have become claimants, of different classes, and with various rights to participate in the distribution of the assets.[13] The real problem, therefore, is one of determining in which class of claimants a defrauded stockholder should properly be placed. The difficulty of this problem varies with the complexity of the corporate organization. In the instant case, however, because of the operation of the federal statute in regard to the distribution of the assets of insolvent national banks,[14] there appeared to be only two general classes of claimants,—depositors and other creditors, and stockholders. The question raised, therefore, is whether the defrauded stockholder should be placed in one of these two classes of claimants, or whether his claim should be given a separate ranking. It would seem that as between the depositors and creditors of the bank and the defrauded stockholder, the former should be given priority. The stockholder is one of the owners and, theoretically at least, has control in the management of the bank. And since he is the one who would have benefited if the bank had prospered, he likewise should bear the loss in case of failure.[15] Moreover, as previously stated, it is he who could best have protected himself against fraud, and also he might be able to recover in an action against the officers of the bank who made the fraudulent misrepresentations. As to other stockholders, however, it would seem just to give a preference to those who were induced by fraud to subscribe to the stock, and there is excellent authority for giving defrauded stockholders this separate ranking.[16] Thus, it would seem that if a stockholder could prove fraud he should be allowed to rescind after insolvency as well as before. However, if he does not bring action to rescind until after insolvency, his claim should be subordinated to the claims of depositors and other creditors, but should be given priority over the claims of the other stockholders.

Federal Tax Distraint on Life Insurance

Courts in two federal districts have recently had to decide the question whether insurance policies are subject to distraint for federal taxes. In a Colorado case the tax delinquent had an annuity contract payable to himself, and two life policies, one a twenty year endowment and the other a straight life policy. Under the life policies, the power to borrow, to realize cash surrender values, and to change the designated beneficiary without the latter's consent, was available to the insured. After distraint warrants had been levied, but before the property had been sold, two suits were brought to quash the warrants and enjoin the sale, one by the insured in respect to the annuity contract and the other by the insured's wife as beneficiary under the life policies. The circuit court of appeals followed the lower court in holding the annuity contract subject to distraint, but reversed it as to the life policies on the ground that, since under Colorado law a beneficiary has a property interest in

13. See excellent discussion of this question by Judge Swan in MacNamee v. Bankers' Union, 25 F. (2d) 614 (C. C. A. 2d, 1928).

14. 13 Stat. 114 (1866), 12 U. S. C. A. § 194 (1927).

15. Cf. Douglas, *Vicarious Liability and Administration of Risk* (1929) 38 Yale L. J. 584, 720.

16. In re Morris Bros., Inc., 293 Fed. 294 (C. C. A. 9th, 1923); MacNamee v. Bankers' Union, 25 F. (2d) 614 (C. C. A. 2d, 1928); Green v. Stone, 205 Ala. 381, 87 So. 862 (1920); Hunsicker v. Gilham, 163 La. 651, 112 So. 518 (1927); Stalnaker v. Gum, 87 W. Va. 283, 104 S. E. 730 (1920).

such policies, they can not be seized for the insured's taxes.[1] A similar case in Pennsylvania involved a straight life policy, which likewise reserved to the insured the power to borrow, to realize the cash surrender value, and to change the beneficiary. The district court refused to allow the distraint, on the ground that under a Pennsylvania statute exempting such policies from claims of the insured's creditors,[2] the policies were the property of the beneficiary. The Circuit Court of Appeals reversed this decision,[3] holding that state exemption statutes are not applicable in enforcing federal revenue laws, and that the beneficiary did not have a vested property right in the policy, the policy being, therefore, subject to distraint for the insured's taxes.

It can be argued that the term "effects" in the federal tax distraint statute refers only to tangible property and that, where the inclusion of intangible property was intended, specific reference was made thereto, as in the case of stocks, securities, bank accounts, and evidences of debt.[4] Since insurance is an intangible chose in action and is not so included, the statute might be construed to exclude it, even though it is not listed as property specifically exempt.[5] Nevertheless, this construction seems strained, for a distinction between tangibles and intangibles could hardly have been intended in establishing a comprehensive and effective system of tax collection. Moreover, under this construction no insurance could be distrained, although it seems proper to subject annuity contracts, in particular, to the process, since they are clearly the delinquent's property and might well be used as a method of evading tax collection.

Life policies, however, raise a more difficult problem. If the policy does not allow the insured to change the beneficiary, the latter's interest is in most states considered an absolutely vested right.[6] Therefore this type of policy could not be levied upon, since state laws of property are observed in enforcing federal statutes,[7] and one spouse's property is not subject to distraint for the taxes of the other spouse.[8] But if, as in the instant cases, the policy allows the insured to change the beneficiary or to obtain the cash surrender value, or to borrow on the policy, the beneficiary's interest during the insured's life may be given either of two interpretations. It has been held that such a beneficiary has no property right, but only an expectancy, analogous to the interest of a legatee under a will.[9] Other courts hold that such a beneficiary has a property interest subject to be defeated by the insured's power to change the beneficiary or to surrender the policy for its cash value or to borrow upon it.[10] Under the first interpretation distraint must be allowed, for the policy is exclusively the property of the insured, who is the delinquent. Under the second interpretation, however, distraint probably will not be allowed.[11] While the first

1. Cannon v. Nicholas, 80 F. (2d) (C. C. A. 10th, 1935), rev'g 10 F. Supp. 718 (D. Colo. 1935).

2. PA. STAT. ANN. (Purdon, 1930) tit. 40 § 517.

3. McGuirk v. Kyle, 80 F. (2d) (C. C. A. 3d, 1936), rev'g 10 F. Supp. 705 (E. D. Penn. 1935), noted in (1936) 49 HARV. L. REV. 660.

4. R. S. § 3187 (1874), 26 U. S. C. A. § 1580 (1935). Bank accounts were included by the Revenue Act of 1924. 43 STAT. 343.

5. R. S. § 3187 (1874); 26 U. S. C. A. § 1581 (1935).

6. See VANCE, INSURANCE (1930) §§ 144-145

7. R. S. § 721 (1874); 28 U. S. C. A. § 725 (1928); Poe v. Seaborn, 282 U. S. 101 (1930); see 5 PAUL AND MERTENS, LAW OF FEDERAL INCOME TAXATION (1934) § 53.38.

8. O. D. 1056, 5 Cum. Bull. 239.

9. See 7 COOLEY, INSURANCE (2d ed. 1927) 6406; 2 COUCH, INSURANCE (1929) § 333; Vance, *Beneficiary's Interest in Life Insurance* (1922) 31 YALE L. J. 343, at 359.

10. See VANCE, INSURANCE (1930) § 147; Note (1921) 35 HARV. L. REV. 80.

11. The district court in Colorado based its decision on this latter interpretation. It

seems more in accord with the substantially complete control retained by the insured over the policy,[12] the second interpretation has been widely accepted as a socially valuable device for denying creditors access to a debtor's life insurance,[13] and thus perhaps assuring some means of support for the insured's family upon his death.[14] In the case of distraint for taxes it appears desirable to adopt the second interpretation, for the amount of money collected by such distraints could hardly be of much importance to the federal government, whereas the hardship caused particular dependents by its loss might be considerable. To reach this interpretation, the Pennsylvania district court construed the state exemption statute as establishing property rights in the beneficiary.[15] But this construction of the statute, which by implication, was rejected by the circuit court of appeals, seems unduly strained,[16] since it is reasonable to conclude that the ownership of exempt property remains in the person whose creditors are barred.[17]

Yet, even under the second interpretation distraint might be allowed if the federal statute[18] were construed so as to include personal powers, such as the insured's powers in the instant cases to change the beneficiary or to acquire the loan or cash surrender values. But neither expressly nor by clear implication does the statute subject powers to distraint, and it can be argued that, had this been the legislative intent, powers would have been specifically included, as in the Bankruptcy Act[19] and in other taxing statutes.[20] At any rate, until Congress clearly formulates a policy, it seems proper not to distrain upon the insured's powers,[21] unless it is shown that the investment in insurance was made in order to evade tax collection. In that case equity might compel the insured to exercise his powers in favor of the government.

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is not clear whether the Circuit Court of Appeals in Pennsylvania rejected this interpretation. For, finding no state decisions directly governing this question of ownership, it merely held that the insured had *sufficient* property rights in the policy to subject the policy to distraint.

12. See VANCE, INSURANCE (1930) 563.

13. National Bank of Commerce v. Appel Clothing Co., 35 Colo. 149, 83 Pac. 965 (1905); Townsend's Assignee v. Townsend, 127 Ky. 230, 105 S. W. 937 (1907).

14. See WOODS, THE SOCIOLOGY OF LIFE INSURANCE (1928) 69.

15. Without aid of the statute one court in Pennsylvania has held such a beneficiary's interest a vested right. Frick v. Lewellyn, 298 Fed. 803 (W. D. Penn. 1924). *Contra:* Noble v. Police Beneficiary Assoc., 224 Pa. 298, 73 Atl. 336 (1909); see Birnie v. Birnie, 67 Pa. Super. 74, 78 (1917).

16. The district court in Colorado refused to give this construction to a similar state statute. Cannon v. Nicholas, 10 F. Supp. 718 (D. Colo. 1935). Cf. COLO. COMP. LAWS (Supp. 1932) § 2533.1. Such statutes would seem to have as their primary purpose the protection of the contingent interests of beneficiaries. Schooley v. Schooley, 184 Iowa 835, 169 N. W. 56 (1917).

17. See Plumiera v. Bricka, 79 Misc. 468, 479, 140 N. Y. Supp. 171, 180 (Sup. Ct. 1913). In bankruptcy exempt property constitutes no part of the bankrupt estate, so that title remains in the bankrupt. See GILBERT'S COLLIER ON BANKRUPTCY (2d ed. 1931) 1227.

18. R. S. § 3187 (1874), 26 U. S. C. A. § 1580 (1935).

19. 30 STAT. 565 (1898), 11 U. S. C. A. § 110 (1926). Under this provision life policies, similar to those in the instant cases, are, unless exempt, assets of the bankrupt insured. Cohen v. Samuels, 245 U. S. 50 (1917).

20. 48 STAT. 752 (1934), 26 U. S. C. A. § 411 (d) (1935).

21. By implication both the Pennsylvania and the Colorado circuit courts of appeal so construed the federal statute. Unlike the Colorado court, however, the Pennsylvania circuit court of appeals found that the insured had a taxable property interest in the policy.

ACCRUAL AS INCOME OF CONTINGENT CLAIMS ON MARCH 1, 1913.

THE owner of a patent brought suit in 1912 to recover profits received since 1909 by an infringer. The suit was pending on March 1, 1913, the effective date of the first income tax statute under the Sixteenth Amendment. The fact of infringement was determined in 1915, further infringement enjoined, and an accounting of profits ordered. From a final decree in 1924, awarding to the patent owner an amount representing the infringer's profits for the period of 1909 to 1914, cross appeals were taken; and in 1925, pending the appeal, the patent owner accepted a settlement of less than half the amount of the award. The United States taxing authorities included the amount of the settlement in the patentee's net income for 1925; and the instant case involved a claim of the patentee for a refund of the tax on that portion of the proceeds of the settlement attributable to acts of infringement prior to March 1, 1913,[1] the petitioner asserting that that amount had accrued prior to the time from which the first income tax under the Sixteenth Amendment applied. Reversing the rulings of the Circuit Court of Appeals for the Third Circuit, which had affirmed the decision of the court below, the United States Supreme Court rejected the petitioner's contention on the ground that the claim was so contingent as to lack the quality of accrued income in 1913, since at that time the existence of any liability was uncertain. It therefore held that the entire amount of the settlement constituted taxable income in 1925 when the settlement was made.[2] Three justices dissented, contending that the claim for patent infringement was a valid one, constituting property with an ascertainable value on March 1, 1913, and that only that portion of the amount of settlement which was for patent infringements occurring after that date was taxable as income.

The allocation to a particular tax year of income received in payment of contingent claims presents an important problem even when there is no question of total or partial accrual prior to March 1, 1913.[3] In determining the time of accrual, a distinction has been made between the liquidation of a determined right and the determination of a disputed right, although for practical purposes one may be as incalculable as the other.[4] Thus where the taxpayer's right to payment is certain, either under a contract or an admission of liability by the other party, and only the amount of the payment remains uncertain, the proceeds are held to constitute taxable income for the year of the occurrence of the events, such as rendition of services, and not for the year when the amount is finally determined or paid.[5] Similarly, expenses such as taxes, for which the taxpayer's liability is certain, are deductible in the year in which the events which fixed his liability occurred, although the amount is not determined or paid until a later year.[6] But when the claim recovered upon is one

1. Approximately 87% of the amount received was attributable to acts of infringement which had occurred prior to March 1, 1913.

2. United States v. Safety Car Heating & Lighting Co., 56 Sup. Ct. 353 (1936).

3. The short statute of limitations and the varying tax rates from year to year have led to much litigation on this question, as taxpayers seek to allocate income to years for which collection of taxes is barred by the statute, or in which the rate is lower, or in which the taxpayer has a net loss against which to offset the income. See Magill, *When Is Income Realized?* (1933) 46 HARV. L. REV. 933, 952.

4. See Comm'r v. Brooklyn Union Gas Co., 62 F. (2d) 505, 507 (C. C. A. 2d, 1933) (dissenting opinion).

5. Continental Tie & Lumber Co. v. United States, 286 U. S. 290 (1932); Comm'r v. Midland Valley Rr. Co., 57 F. (2d) 1042 (C. C. A. 10th, 1932); Texas & Pacific Railway Co., 9 B. T. A. 365 (1927); Crowninshield Shipbuilding Co., 24 B. T. A. 925 (1931).

6. United States v. Anderson, 269 U. S. 422 (1926); Uncasville Mfg. Co. v. Comm'r,

under which both the taxpayer's right and the amount are uncertain, as is true with most litigated claims, the proceeds are taxable income in the year in which the controversy is finally settled and the taxpayer's right becomes unconditional.[7] Eliminating from the instant case for the moment the question of the non-taxability of income accrued prior to March 1, 1913, the decision that the proceeds of the claim for infringer's profits were taxable as income in the year of the final settlement seems in accord with the rules noted above for the determination of "accrual" as between different tax years. For, while the acts of infringement which gave rise to the claim occurred during the period from 1909 to 1914, the patent owner's right to any recovery was uncertain until the fact of infringement was determined in 1915. And, while it seems that under the rule stated above there might have been some basis for holding that the proceeds were taxable in 1915, the point does not seem to have been argued. Furthermore, it is possible that the fact that the amount of the recovery depended entirely on the the rsults of the later accounting, so that the taxpayer, prior to 1925, had no reasonable basis upon which to account for the income, would have precluded allocation of the income to 1915.[8]

But all income "accrued" prior to March 1, 1913, is capital for income tax purposes —not because of its inherent nature, but because income was not taxable without

55 F. (2d) 893 (C. C. A. 2d, 1932), cert. denied, 286 U. S. 545 (1932); American Cigar Co., 21 B. T. A. 464 (1930).

7. Burnet v. Sanford & Brooks Co., 282 U. S. 359 (1931) (suit for breach of warranty); Kentucky & Indiana Terminal Rr. Co. v. Comm'r, 54 F. (2d) 738 (C. C. A. 6th, 1931), cert. denied, 286 U. S. 557 (1932) (claim for tolls collected by government in operation of railroad during war); Peninsula Shipbuilding Co., 9 B. T. A. 189 (1927) (claim for depreciation as part of cost under shipbuilding contract); Household Products, Inc., 24 B. T. A. 594 (1931) (claim for interest on tax refunds). The converse of the same rule applies to the time when losses may be deducted. Lucas v. American Code Co., Inc., 280 U. S. 445 (1930) (judgment for breach of contract); cf. Burnet v. Huff, 288 U. S. 156 (1933). The necessary degree of finality of the settlement is somewhat doubtful: a settlement by agreement of the parties is sufficient, Peninsula Shipbuilding Co., 9 B. T. A. 189 (1927); with litigated claims a final determination on appeal has been held necessary, Burnet v. Sanford & Brooks Co., 282 U. S. 359 (1931); W. W. Sly Mfg. Co., 24 B. T. A. 65 (1931); but the income has been held to accrue, although an appeal is pending, when the money is actually received under a claim of right, North American Oil Consolidated v. Burnet, 286 U. S. 417 (1932), or where the money could have been received under court decree upon filing of a bond, Comm'r v. Brooklyn Union Gas Co., 62 F. (2d) 505 (C. C. A. 2d, 1933). For criticisms of the North American Oil case, see Magill, op. cit. *supra* note 3, at 946-7, and of the Brooklyn Union Gas case, see dissenting opinion of L. Hand, J. in that case, 62 F. (2d) 505, 507 (C. C. A. 2d, 1933).

It is immaterial that actual payment may be made in a year later than that in which the right becomes unconditional, Lichtenberger-Ferguson Co. v. Welch, 54 F. (2d 570 (C. C. A. 9th, 1931) (taxpayer used the accrual method of accounting), or that the recovery represents compensation for services rendered or injuries sustained in prior years, Burnet v. Sanford & Brooks Co., 282 U. S. 359 (1931); Comm'r v. Southeastern Express Co., 56 F. (2d) 600 (C. C. A. 5th, 1932); Armstrong Knitting Mills, 19 B. T. A. 318 (1930); Dexter Sulphite Pulp and Paper Co., 23 B. T. A. 227 (1931); W. W. Sly Mfg. Co., 24 B. T A. 65 (1931) (claim for patent infringer's profits).

8. See cases cited in notes 5 and 6, *supra*. In these cases the facts from which the amount of recovery or liability was to be determined were available to the taxpayer, so that a reasonable estimate of the amount might be made in advance of final determination, a factor which might be used to distinguish them from the instant case.

apportionment prior to that date.[9] Accordingly, when property owned before March 1, 1913, is sold after that date, the proceeds are taxable income only insofar as they represent an increase over the fair value of the property on that date.[10] And the proceeds of claims existing unconditionally on March 1, 1913, though paid thereafter, have been declared exempt by treasury regulation, subsequently ratified by Congress.[11] But this exemption of unconditional claims existing on March 1, 1913, would seem to indicate an intention to tax the proceeds of claims which were conditional on that date. And although it is arguable, in line with previous decisions of lower federal courts,[12] and the dissent in the instant case, that such a contingent claim was property on March 1, 1913, and as such taxable only as to that portion of the total recovery attributable to events occurring since that time, the rest being capital for income tax purposes because accruing before that date, nevertheless the majority decision seems preferable from the standpoint of logic and consistency. For, treatment of the proceeds of a claim, contingent both as to right and amount, as unformly taxable in the year of final settlement without regard to the date when the claim arose, eliminates the former practice of giving "accrual" one definition as applied to contingent claims arising after March 1, 1913, and another as applied to such claims arising prior to that date. And from a practical viewpoint, while a contingent claim may be classified as property for some purposes, the claim in the instant case would hardly be treated by an accountant or business man as capital or as having accrued as income on March 1, 1913, at which time its validity was yet undetermined and its value was merely potential.

9. See 1 PAUL AND MERTENS, LAW OF FEDERAL INCOME TAXATION (1934) § 5.15.

10. Doyle v. Mitchell Bros. Co., 247 U. S. 179 (1918) (land); Lynch v. Turrish, 247 U. S. 221 (1918) (liquidation of corporation); Lucas v. Alexander, 279 U. S. 573 (1929) (endowment insurance policy); Burnet v. Logan, 283 U. S. 404 (1931) (stock); cf. Saunders v. Commissioner, 29 F. (2d) 834 (C. C. A. 3d, 1928) (rights in invention sold prior to March 1, 1913, and paid for thereafter); Heiner v. Hewes, 30 F. (2d) 787 (C. C. A. 3d, 1929) (land against which adverse claims existed on March 1, 1913).

11. T. R. 62, Art. 90; appearing without change in subsequent Treasury Regulations, T. R. 65, Art. 90; T. R. 69, Art. 90; T. R. 74, Art. 91; T. R. 77, Art. 90. These regulations have by clear implication been ratified by Congress, which has passed subsequent revenue acts without expressing disapproval. See Zellerbach Paper Co. v. Helvering, 293 U. S. 172, 179-180 (1934).

12. Buffalo Union Furnace Co. v. Helvering, 72 F. (2d) 399 (C. C. A. 2d, 1934); Park v. Gilligan, 293 Fed. 129 (S. D. Ohio, 1921); Christensen v. Comm'r, 33 B. T. A. 79 (1935). The Buffalo Union Furnace Co. case was distinguished by the Court in the instant case by confining it to its peculiar facts. However, the present decision seems definitely to disapprove the principle there applied.